Law Reform Commission

The Legislative Assembly and Conflict of Interest

2000

Report on *Legislative Assembly and Conflict of Interest* (Report #106, 2000)

ERRATA

Page 68 and pages 96-97: Recommendation 33 should be deleted and replaced with:

> ***The Act should prohibit Cabinet, individual Ministers, and public servants from awarding contracts or approving benefits to a former Minister in circumstances where the former Minister is prohibited by the Act from entering into such contracts or receiving such benefits, unless the conditions on which the contract or benefit was awarded, approved, or granted are the same for all persons similarly entitled.***

Pages 70 and 97: Recommendation 35 should be amended by adding at its end the words:

> ***unless the conditions on which the contract or benefit was awarded, approved, or granted are the same for all persons similarly entitled.***

Page 127, line 1: the word "ne" should be deleted.

101-02751/

Manitoba

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THE LEGISLATIVE ASSEMBLY AND CONFLICT OF INTEREST

Report #106

December 2000

Canadian Cataloguing in Publication Data

Manitoba. Law Reform Commission.

The Legislative Assembly and Conflict of Interest

(Report ; #106)

Includes bibliographical references.
ISBN 0-7711-1516-4

1. Legislators -- Legal status, law, etc. -- Manitoba. 2. Manitoba. Legislative Assembly -- Ethics. 3. Conflict of interests -- Manitoba. 4. Legislative bodies -- Ethics. I. Title. II. Series : Report (Manitoba. Law Reform Commission) ; #106

KEM471.C6M36 2000 342.7127'055 C00-962013-3

Some of the Commission's earlier Reports are no longer in print. Those that are still in print may be purchased from the Publications Branch, 200 Vaughan Street, Winnipeg, Manitoba R3C 1T5

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The Manitoba Law Reform Commission is funded by grants from:

The Government of Manitoba

and

The Manitoba Law Foundation

TABLE OF CONTENTS

		Page #
CHAPTER 1 - INTRODUCTION		1
A.	INTRODUCTION	1
B.	OUTLINE OF REPORT	1
C.	ACKNOWLEDGEMENTS	2
CHAPTER 2 - CONFLICT OF INTEREST LEGISLATION		3
A.	CONFLICTS OF INTEREST	3
B.	MANITOBA'S CONFLICT OF INTEREST LEGISLATION	5
C.	CONFLICT OF INTEREST PROVISIONS	6
D.	DISCLOSURE PROVISIONS	7
E.	INFLUENCE AND BENEFIT PROVISIONS	7
F.	REMEDIAL PROVISIONS	8
G.	*THE MUNICIPAL COUNCIL CONFLICT OF INTEREST ACT*	9
CHAPTER 3 - OTHER CONFLICT OF INTEREST REGIMES		10
A.	PROVINCIAL REGIMES	10
	1. Generally	11
	2. Alberta	11
	3. British Columbia	12
	4. New Brunswick	12
	5. Newfoundland	13
	6. Northwest Territories	13
	7. Nova Scotia	14
	8. Nunavut Territory	14
	9. Ontario	14
	10. Prince Edward Island	15
	11. Québec	15
	12. Saskatchewan	16
	13. Yukon Territory	16
B.	CANADA	16
C.	UNITED KINGDOM	17
D.	AUSTRALIA	18
E.	UNITED STATES OF AMERICA	19
CHAPTER 4 - REFORM OF MANITOBA'S EXISTING LEGISLATION		21
A.	INTRODUCTION	21
	1. *The Municipal Council Conflict of Interest Act*	22
B.	NEW ACT	22

C.	CONFLICT OF INTEREST COMMISSIONER		23
	1.	Officer of Legislative Assembly	27
	2.	Appointment	28
	3.	Eligibility of Incumbent	29
	4.	Scope of Responsibilities	30
	5.	Supervision of Disclosure Requirements	31
	6.	Advice and Guidance	33
	7.	Educational Activities	35
	8.	Enforcement of the Act	37
	9.	References to the Commissioner	37
	10.	Powers of Investigation	40
	11.	Remedial Powers	41
	12.	Appeals	45
	13.	Reporting	46
	14.	Personal Liability	46
	15.	Additional Provisions	47
D.	DEFINING CONFLICTS OF INTEREST		48
	1.	Conflict of Interest Provisions	48
	2.	Apparent Conflicts of Interest	54
	3.	Exemption Provisions	56
	4.	Dependants	59
	5.	Professional Obligations	61
	6.	Gifts	62
E.	APPLICATION OF THE ACT		64
	1.	Application to Ministers and Leader of the Official Opposition	64
	2.	Application to Senior Public Servants	65
	3.	Post-Employment Restrictions	67
F.	DISCLOSURE PROVISIONS		70
	1.	Extent of Disclosure	71
	2.	Disclosure of Amounts	74
	3.	Income	76
	4.	Public Availability of Disclosure Information	77
	5.	Disclosure Forms	79
G.	OUTSIDE INTERESTS		79
	1.	Blind Trusts	81
	2.	Expenses Incurred	84
H.	STATEMENT OF PRINCIPLE		84
	1.	Parliamentary Convention	88
I.	MISCELLANEOUS AMENDMENTS		88
	1.	Provisions of *The Legislative Assembly Act*	89
	2.	Document Retention	90
	3.	Automatic Review	91

CHAPTER 5 - LIST OF RECOMMENDATIONS 93

APPENDIX A - DRAFT CONFLICT OF INTEREST ACT 101

EXECUTIVE SUMMARY 121

RÉSUMÉ 125

CHAPTER 1

INTRODUCTION

A. INTRODUCTION

This Report had its genesis in a memorandum prepared by one of the Commission members in July of 1998, which identified a number of weaknesses in the existing *Legislative Assembly and Executive Council Conflict of Interest Act*.[1] After some delays in securing funding, the Commission initiated a further review of the legislation which culminated in this Report.

What follows is a comprehensive review of the Act, set in the context of developments in other jurisdictions (particularly other Canadian jurisdictions) in the almost two decades since it was enacted in 1983. In the course of its research, the Commission learned that conflict of interest issues, and issues of ethics in the public sector in general, have been the subject of vigorous debate and sweeping legislative reform, particularly in the last ten to fifteen years. Many changes to conflict of interest legislation have been proposed, and many experiments undertaken, providing the Commission with material on which to draw in the preparation of its recommendations regarding Manitoba's legislation.

The Commission strongly believes that the implementation of the recommendations made in this Report will provide Manitobans with a much needed and long overdue system of conflict of interest rules that will greatly enhance public confidence in elected provincial representatives, without compromising the privacy interests of those representatives. It will also provide Manitoba's elected representatives with invaluable assistance in preventing even the appearance of conflicts of interest. As was recently pointed out by the *Winnipeg Free Press*:

> No rule, no code of conduct and no ethics agency can guarantee completely against the wrongdoing of a government official. A skeptical public knows this. It would be reassuring, however, to know that those elected to office can agree on what the standards should be. Manitobans today are in particular need of that reassurance.[2]

B. OUTLINE OF REPORT

The first Chapter of this Report examines the reasons why conflict of interest legislation exists, and briefly describes Manitoba's existing statutory scheme.

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[1] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, referred to in this Report as "the Act".

[2] "Ethical dilemma", *Winnipeg Free Press* (4 July 2000) A10.

The second Chapter is devoted to a short history of the development of conflict of interest legislation in other Canadian jurisdictions, as well as the United States, the United Kingdom, and Australia.

The remainder of the Report consists of a detailed discussion of potential reforms to *The Legislative Assembly and Executive Council Conflict of Interest Act*, as well as the Commission's recommendations for improvement. The Commission has made a total of 50 recommendations which, taken as a whole, would require a significant reshaping of the Act. Given the extent of the proposed changes, the Commission believes that the best course of action would be the repeal of the existing legislation and the enactment of a new *Conflict of Interest Act*, a draft of which is attached as Appendix A to this Report.

C. ACKNOWLEDGEMENTS

The Commission wishes to thank Mr. Jonathan G. Penner and Ms Blane Morgan, independent researchers, who prepared this Report. We also wish to thank the Hon. Madam Justice Eleanor R. Dawson who, prior to her appointment to the Federal Court of Canada, was a member of the Manitoba Law Reform Commission. She participated in the initial stages of this project and her knowledge and experience in this area of the law was of great assistance in our deliberations.

As well, the Commission gratefully acknowledges the support of the Department of Justice and The Manitoba Law Foundation, which provided the funding for the completion of this project.

CHAPTER 2

CONFLICT OF INTEREST LEGISLATION

A Legislative Assembly comprised of members committed to the principles of honesty and integrity is fundamental to a democratic society as Canadians understand that term.[1]

A. CONFLICTS OF INTEREST

Over the past thirty years, North American society has become increasingly intolerant of misbehaviour by politicians. A particular manifestation of this phenomenon in Canada has been the gradual introduction and expansion of rules regarding "conflicts of interest".

The Supreme Court of Canada has provided a helpful definition of a "conflict of interest," in the context of municipal councils:

> "It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest."[2]

The Manitoba Court of Appeal has described the underlying basis for the ethical concern raised by a conflict of interest, again in the context of municipal conflict of interest legislation:

> "This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its

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[1] *R.* v. *McLaren* (1995), 135 Sask. R. 137 at para. 25 (Q.B.), per Grotsky J.; online QL (SJ).

[2] *Old St. Boniface Residents Assn. Inc.* v. *Winnipeg (City)*, [1990] 3 S.C.R. 1170, cited in *Arbez* v. *Johnson* (1998), 126 Man. R. (2d) 271, at para. 30 (C.A.).

elected representatives demands no less."[3]

Conflicts of interest must be distinguished from corruption, which comprises more serious offences against the public interest. Corruption, which includes such offences as bribery and fraud on the government, has always been prohibited by the *Criminal Code*, and relatively few instances of corruption have arisen in modern Canadian political history. Conflicts of interest, on the other hand, find their way into the headlines rather more frequently, and until relatively recently were not the subject of any formal or written controls.

The federal government first introduced a written code of conduct for Cabinet ministers in 1964, a code which has been revised by successive administrations but remains the only formal guidance for elected politicians at the federal level.[4]

In the provinces and territories, various codes of conduct were also introduced, beginning in the 1970s, but have by now largely been supplanted by conflict of interest legislation. That legislation applies not only to Cabinet ministers, but to members of the legislative assembly and, often, senior public servants as well.[5]

Conflict of interest legislation does not necessarily have as its primary purpose the improvement of the ethical standards of legislators. Most commentators would agree that the majority of public office holders are decent, hard working men and women who do their best to serve the public interest as they understand it. Conflict of interest legislation is largely intended to assist elected representatives, by providing an objective standard against which they may gauge their actions, and satisfy themselves and the public that they are acting appropriately. This rationale was aptly described by the Ontario Ethics Commissioner in 1996:

> The primary purpose of integrity legislation is not to promote high ethical standards among members, all of whom, we expect, having chosen to aspire to public office, possess the necessary moral qualities that entitle them to be referred to as honourable members in the legislature or in Parliament. Rather it is a standard against which the ever-increasingly cynical and suspicious press and public may measure their behaviour in office. It may not appease the more rabid critics, but it will serve as a source of satisfaction to the member whose conduct is under attack to know that it meets the standard by which his peers are also judged.[6]

The perceived value of conflict of interest legislation in the Canadian context is evidenced

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[3] *Moll* v. *Fisher* (1979), 23 O.R. (2d) 609 at 612 (Div. Ct.), cited in *Arbez* v. *Johnson*, *supra* n. 2, at para. 24.

[4] I. Greene and D.P. Shugarman, *Honest Politics* (1997) 49-52.

[5] *Id.*, at 52-54.

[6] G. Evans, in G. Evans et al., "A Roundtable on Ethics and Conflict of Interest" (1995-96), 18 Can. Parl. Rev. 25 at 26.

by the fact that every province and territory now has legislation specifically designed to prevent conflicts of interest, and to deal with conflicts when they arise.

B. MANITOBA'S CONFLICT OF INTEREST LEGISLATION

The first step toward modernizing Manitoba's conflict of interest controls was taken by the Schreyer administration in the 1970s. A draft bill was introduced in the fall of 1974 and then, after some amendment, re-introduced into the Legislative Assembly in June of 1975 as Bill 37. Among other things, Bill 37 would have:

- prohibited members from voting on any questions in which they or one of their dependants had a "direct pecuniary interest";
- defined "direct pecuniary interest" as, essentially, an interest comprising more than 5% by value of the subject matter of the question;
- required annual disclosure by members of a prescribed statement of assets and interests, the individual value of which exceeded $500;
- disqualified members who failed to file the required disclosure forms; and
- referred allegations of false or misleading disclosure to the Standing Committee on Privileges and Elections.

Bill 37 would also have extended almost identical requirements to municipal councillors and "senior officials," defined to include deputy ministers, associate deputy ministers, assistant deputy ministers, Chief Executive Officers of Crown agencies, and the like.[7]

Had it been passed into law, Bill 37 would have been only the second legislated conflict of interest code in Canada.[8] The Bill, however, received some trenchant criticism in the House, largely on the basis of concern about the invasion of members' privacy.[9] It was sent back to a legislative committee for further review, and was never reintroduced.

A subsequent NDP administration reintroduced conflict of interest legislation seven years later. Bill 18, *The Legislative Assembly and Executive Council Conflict of Interest Act*, received second reading in the Assembly on 17 December 1982. At the time, the Opposition took issue with some of the specific provisions, but supported the principle of the legislation:

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[7] Bill 37, *An Act Respecting Disclosure of Interests in Matters of Public Concern and Conflicts of Interests of Persons Holding Public Office*, 2nd Session, 30th Leg., Manitoba, 1975, cls. 5 and 7.

[8] Newfoundland's was the first: *The Conflict of Interest Act*, S.N. 1973, No. 113.

[9] Manitoba, Legislative Assembly, *Debates and Proceedings* (6 June 1975) at 3562-64, (10 June 1975) at 3695-715, and (11 June 1975) at 3729-33 and 3755-66.

> I repeat ... that, in general, I approach the topic of conflict of interest legislation, and I think my colleagues would agree with me on this point and, therefore, I think I speak for them at this juncture on this point. We approach the concept of it as an acceptable and a desirable course of action; no one can argue with conflict of interest legislation that is aimed at guaranteeing honesty in public life; no one can argue with conflict of interest legislation that is aimed at protecting the public interest.[10]

The Act received Royal Assent on 18 August 1983, and (as amended in 1988) remains Manitoba's legislated proscription of conflicts of interest among Members of the Legislative Assembly and Cabinet.[11]

At the time it was introduced, the Act was still one of the first conflict of interest statutes in Canada, and as such it served to place Manitoba in the forefront of the movement toward formal regulation of the ethical behaviour of public office holders. Amendments under a different administration five years later[12] served to expand the ambit of the Act, and to reinforce Manitoba's position as a leader in the development of conflict of interest legislation.

C. CONFLICT OF INTEREST PROVISIONS

The Act's conflict of interest provisions are predicated on preventing individuals' "direct or indirect pecuniary interests or liabilities" from affecting decisions by the Assembly or Cabinet. "Direct" pecuniary interests or liabilities are not exhaustively defined, and "indirect" pecuniary interests and liabilities are defined as arising where the member has a relationship with a person or organization that has a direct interest or liability in a matter.[13] A conflict of interest arises, essentially, where a member is in a position to deal with a matter in which he or she has a direct or indirect pecuniary interest. It also arises if the member has a direct or indirect pecuniary liability to another person or organization that has a direct or indirect pecuniary interest in the matter.

Sections 4 through 10 of the Act set out the procedures to be followed by Members of the Legislative Assembly and Ministers who find themselves in a conflict of interest in the context of a meeting or, for Ministers, during the exercise of an official power or performance of an official

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[10]Manitoba, Legislative Assembly, *Debates and Proceedings* (27 April 1983) at 2150 (L. Sherman).

[11]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112.

[12]*The Legislative Assembly and Executive Council Conflict of Interest Amendment Act*, S.M. 1988-89, c. 26.

[13]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, ss. 1, 3(1), and 3(4).

duty or function.[14] Essentially, where a conflict of interest arises in any of those situations, the member must disclose the general nature of the conflict, withdraw from the meeting without voting or participating in the discussion, and refrain from attempting to influence the matter.[15] The clerk of the meeting is required to record the member's actions and file the information with the Clerk of the Assembly.[16]

The Act further requires that if a member fails to comply with these requirements merely because he or she was absent from the meeting in question, he or she must make disclosure at the next meeting, and continue to refrain from attempting to influence the matter.[17]

D. DISCLOSURE PROVISIONS

Sections 11 through 17 of the Act establish a regime whereby members must regularly disclose the nature of their assets and interests to the Clerk of the Legislative Assembly. The disclosure need not include the value of the assets and interests, but it must include the assets and interests of the member's "dependants", defined to mean a spouse and children who reside with the member.[18]

The Clerk must make the completed disclosure forms available to any member of the public who wishes to view them.[19]

E. INFLUENCE AND BENEFIT PROVISIONS

Sections 18 through 19.4 of the Act deal with three discrete topics. These provisions differ from the conflict of interest and disclosure provisions in that they apply not only to members, but to "senior public servants". These persons are defined as including deputy ministers, assistant deputy ministers, the Clerk of Cabinet, heads and deputy heads of Crown agencies, and those holding positions designated by Cabinet as included.[20]

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[14]Throughout this Report, reference will be made to situations that apply to both members and Ministers. For ease of reference, we will simply use the term "member" to include both members and Ministers, unless the context clearly indicates otherwise.

[15]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, ss. 4(1) and 7.

[16]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 5.

[17]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 9.

[18]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 1.

[19]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 17.

[20]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 1.

First, section 18 (the "insider information" provision) prohibits the

> ... use for personal gain or for the gain of another person [of] information that is not available to the public and which the member, minister or senior public servant acquires in the performance of his or her official powers, duties and functions.[21]

This prohibition also extends to *former* members, Ministers, and senior public servants for an indefinite period.

Second, section 19 (the "use of influence" provision) prohibits communication with other members, Ministers, or government employees for the purpose of influencing a decision in which the member or senior public servant has a pecuniary interest.

Like the provision dealing with insider information, this provision applies to former Ministers and former senior public servants, although only for a period of one year following the date on which they leave office.

Finally, sections 19.1 through 19.4 deal with the relationship between former Ministers and senior public servants, on the one hand, and the Crown on the other. Former Ministers and senior public servants are prohibited from entering into a contract with, or accepting a benefit from, the Crown or a Crown agency (with certain exceptions).[22] As well, they are prohibited for one year from acting for or on behalf of anyone in relation to matters on which they acted for or advised the government, and from involvement in certain activities on behalf of organizations with which they had official dealings in the year prior to leaving office.[23]

F. REMEDIAL PROVISIONS

Sections 20 through 32 set out how the Act is to be enforced. Any voter who believes that the Act has been violated by a member may apply to the Court of Queen's Bench for permission to have a judge of the Court hear a complaint against that member. In order to make such an application, the voter must pay $300 into court, and file an affidavit setting out details of the alleged violation. If the court is not persuaded that there are grounds for ordering a hearing, it may dismiss the application and order forfeiture of some or all of the $300.

If a hearing is held, and the court decides that the member has violated the Act, the member may be disqualified from holding office, suspended for up to 90 days, fined up to $5,000, and/or

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[21] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 18(1).

[22] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 19.1.

[23] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, ss. 19.2 and 19.3.

ordered to make restitution of any pecuniary gain he or she has realized. If the court finds that the violation was unknowing or inadvertent, only restitution may be ordered. Any disqualification or suspension is without pay for its duration.

Any member who fails to file a disclosure statement within the required time period is automatically suspended without pay until he or she files the statement. No court proceedings are necessary for this suspension to occur. If the member fails to file a statement before the legislative session ends, he or she is automatically disqualified from office.

Senior public servants, former Ministers, and former senior public servants who violate any of the provisions on insider information or use of influence, or the post-employment restrictions, can be prosecuted under *The Summary Convictions Act* and, if convicted, fined between $1,000 and $10,000.

It does not appear that any of the remedial provisions of the Act have ever been used.[24]

G. *THE MUNICIPAL COUNCIL CONFLICT OF INTEREST ACT*

It should be noted that following the Commission's 1981 Report on *Conflict of Interest of Municipal Councillors*,[25] the government of the day enacted *The Municipal Council Conflict of Interest Act*,[26] the provisions of which are functionally identical to the provisions of *The Legislative Assembly and Executive Council Conflict of Interest Act*.[27] The courts have heard a number of complaints brought under the municipal legislation, which have proven useful in interpreting the provisions of the legislation governing members.

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[24]E-mail from P. Chaychuk, Clerk of the Legislative Assembly, Province of Manitoba, to Jonathan Penner (1 February 2000).

[25]Manitoba Law Reform Commission, *Conflict of Interest of Municipal Councillors* (Report #46, 1981).

[26]*The Municipal Council Conflict of Interest Act*, S.M. 1982-83-84, c. 44.

[27] The two Acts were in fact passed into law on the same day, 18 August 1983.

CHAPTER 3

OTHER CONFLICT OF INTEREST REGIMES

Since Manitoba first introduced its conflict of interest legislation in 1983, there have been numerous similar developments in other Canadian jurisdictions. Every provincial Legislature has enacted legislation governing conflicts of interest that affect its members; so have all three territories. As well, the federal Parliament has more than once revised the guidelines that govern federal Cabinet Ministers, and considered extending some of them to Members of Parliament.

Manitoba last amended its legislation in 1989. Since that time, numerous studies have been undertaken, and reports prepared, on the various conflict of interest regimes in Canada. As a result of these studies and reports, sweeping changes have been made to conflict of interest legislation in virtually every jurisdiction. There has been a clear trend, for example, toward the establishment of a permanent official with responsibility to oversee and implement the conflict of interest legislation in each jurisdiction. Manitoba is unique in that it is the only jurisdiction in Canada that has not appointed such an official.

The subject of ethics in government, including conflict of interest legislation, has also been revisited in the United Kingdom, Australia, and the United States. International organizations have also taken an interest in the topic. The Commission has seriously considered these developments with a view to the lessons they may hold for Manitoba.

A. PROVINCIAL REGIMES

As mentioned previously, all the Canadian provinces and territories have legislation governing conflicts of interest among their legislators, and most have significantly revised their legislation in the years since Manitoba last amended its Act.

Many Canadian jurisdictions have expanded the ambit of their legislation to cover more than simply conflicts of interest. Such legislation is intended to encompass "ethics in government" more generally. One facet of some legislative schemes, for example, is a set of rules to govern the activities of paid lobbyists.[1] Unfortunately, this expansion is outside the scope of the present Report, and will not be discussed in detail.

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[1] See, for example, the *Lobbyists Registration Act, 1998*, Schedule to the *Integrity Commissioner and Lobbyists Statute Law Amendment Act, 1998*, S.O. 1998, c. 27.

1. Generally

The conflict of interest regimes in Canada's provinces and territories (other than Manitoba) currently share a number of common features. In general outline, they are similar to Manitoba's legislation in that they provide for disclosure of legislators' assets and interests, declaration and withdrawal from meetings in which a specific conflict of interest arises, and prohibition of improper use of insider information or influence.

There are common features in the other provincial and territorial legislation that are not shared by Manitoba's legislation, however. The most significant is the provision in virtually all other regimes for an individual (usually known as a conflict of interest commissioner) to administer the provisions of the legislation and investigate alleged violations. Enforcement of almost all other conflict of interest legislation is also the responsibility of the legislative assembly, rather than the courts.

2. Alberta

In 1989, the Alberta Cabinet established a three person Conflict of Interest Review Panel, and directed it to examine and make recommendations regarding conflict of interest legislation and guidelines for Ministers, Members, and some senior public servants.[2] The Panel's 254 page Report (referred to in this Report as the "1990 Alberta Report") was presented in February 1990, and proposed a sweeping reorganization of the province's patchwork of conflict of interest rules.[3] In response to the Panel's Report, the *Conflicts of Interest Act*[4] was passed in 1991, although it was not proclaimed into effect until March 1993.

In November of 1995, the Ethics Commissioner who had been appointed under the Act requested that another three person panel review the operation of the Act and related matters. The Panel's Report was released in January 1996,[5] and recommended further, major, revision of Alberta's conflict of interest system.

As a result of this second Report, the Legislature passed the *Conflicts of Interest Amendment Act*[6] in December 1998, although that legislation has not yet been proclaimed in effect.

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[2]O.C. 425/89.

[3]Alberta, Conflict of Interest Review Panel, *Report on Conflicts of Interests Rules for Cabinet Ministers, Members of the Legislative Assembly and Senior Public Servants* (1990).

[4]*Conflicts of Interest Act*, S.A. 1991, c. C-22.1.

[5]Alberta, Conflicts of Interest Act Review Panel, *Integrity in Government in Alberta: Towards the Twenty First Century* (1996).

[6]*Conflicts of Interest Amendment Act*, S.A. 1998, c. 33.

The Government effectively accepted almost all of the Panel's recommendations.[7]

3. British Columbia

British Columbia was one of the last jurisdictions in Canada to introduce conflict of interest legislation. The Legislature only passed the *Members' Conflict of Interest Act*[8] in July of 1990; the Act was proclaimed in effect in December of that year. The first Commissioner of Conflict of Interest was appointed in September 1990. The Act was amended in 1992, primarily to extend its reach to "apparent" conflicts of interest.[9]

A Legislative Committee recently reviewed the operation of the legislation, and made recommendations that will be reviewed by the Government.[10]

4. New Brunswick

New Brunswick first introduced conflict of interest legislation, the *Conflict of Interest Act*[11] in 1978, making it one of the first Canadian jurisdictions to introduce such legislation. Unfortunately, the legislation was amended in 1980 to such an extent that the Designated Judge whose responsibility it was to enforce the Act resigned, saying:

> The Act has been amended to legalize what I consider a conflict of interest. In my opinion, the *Conflict of Interest Act* is becoming a farce.[12]

In January 1997, Mr. Justice William Creaghan of the New Brunswick Court of Queen's Bench was appointed to review and make recommendations on the Act. Following his Report,[13] the *Members' Conflict of Interest Act* was passed in March 1999, and proclaimed in force effective 1 May 2000. (The former Act, in amended form, will still apply to senior public servants and

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[7]"Government of Alberta's response to the *Conflict of Interest Act* Review Panel Proposed Integrity in Government and Politics Act", provided by Office of Ethics Commissioner via e-mail to Jonathan Penner (2 February 2000). See also the text accompanying footnote 148 in Chapter 4.

[8]*Members' Conflict of Interest Act*, S.B.C. 1990, c. 54.

[9]*Members' Conflict of Interest Amendment Act, 1992*, S.B.C. 1992, c. 64.

[10]British Columbia, Legislative Assembly, Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills, *First Report on the Members' Conflict of Interest Act* (6 December 1999).

[11]*Conflict of Interest Act*, S.N.B. 1978, c. C-16.1.

[12]Quoted in *Review and Recommendations of William L.M. Creaghan on the New Brunswick Conflict of Interest Act* (1997) at 17.

[13]*Id.*

heads of Crown corporations.) The new Act is much more in line with legislation that is currently in force in other Canadian jurisdictions.

5. Newfoundland

Newfoundland first introduced conflict of interest legislation in 1973.[14] The legislation applied both to Members of the House of Assembly and to a large number of civil servants. In 1993, the *House of Assembly Act*[15] was amended[16] to add a Part II headed "Conflict of Interest," replacing both the 1973 Act, as it applied to members, and guidelines for Cabinet Ministers that had been in place since 1982.[17] In 1995, the *Conflict of Interest Act, 1995*[18] replaced the 1973 Act insofar as it applied to civil servants.

In November 1997, new Conflict of Interest Guidelines were promulgated by the Premier to apply to Cabinet Ministers, over and above the requirements of the *House of Assembly Act*.[19]

6. Northwest Territories

Until last year, the relevant legislation in the Northwest Territories was Part III of the *Legislative Assembly and Executive Council Act*,[20] which was added to the Act in 1991.[21] After being amended in 1996 primarily to replace the three member Conflict of Interest Commission with a single Conflict of Interest Commissioner,[22] the Act was replaced in 1999[23] in order to

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[14] *The Conflict of Interest Act*, S.N. 1973, No. 113.

[15] *House of Assembly Act*, R.S.N. 1990, c. H-10.

[16] *An Act to Amend the House of Assembly Act*, S.N. 1993, c. 1.

[17] D.W. Mitchell in G. Evans et al., "A Roundtable on Ethics and Conflict of Interest" (1995-96), 18 Can. Parl. Rev. 25 at 27.

[18] *Conflict of Interest Act, 1995*, S.N. 1995, c. C-30.1.

[19] Newfoundland, Executive Council, "Conflict of Interest Guidelines for Ministers" (1997), online: <http://www.gov.nf.ca/releases/1997/exec/1119n04.htm> (date accessed: 31 January 2000).

[20] *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5.

[21] By R.S.N.W.T. 1988, c. 120 (Supp.).

[22] *Budget Measures Implementation Act, 1996-97*, S.N.W.T. 1996, c. 9, Sch. B.

[23] *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22.

implement the recommendations of a distinguished review panel.[24] This Act has the distinction of being one of the few in Canada under which a member of a legislative assembly has actually been forced to resign following an investigation into an allegation of conflict of interest.[25]

7. Nova Scotia

The Legislature of Nova Scotia enacted the *Conflict of Interest Act*[26] in 1987. That Act was replaced by the *Members and Public Employees Disclosure Act*[27] in 1991, which was amended in 1992.[28] Unlike the *Conflict of Interest Act*, the new Act applies to public employees. The Nova Scotia Act is the only one in Canada that continues to be enforced by a "designated" judge or retired judge, instead of a conflict of interest commissioner.

8. Nunavut Territory

When Nunavut separated from the Northwest Territories on 1 April 1999, the laws of the Northwest Territories were deemed to be the laws of Nunavut.[29] (For this reason, throughout this Report, when reference is made to Nunavut legislation, the citation is to the applicable Northwest Territories Act or regulation.) The conflict of interest legislation adopted by Nunavut was replaced a few months later by the Northwest Territories, but the older Act continues to apply in Nunavut.

9. Ontario

In Ontario, the former conflict of interest guidelines were replaced by the *Members' Conflict of Interest Act* in 1988, following the recommendations of a report by J.B. Aird in 1986.

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[24] Northwest Territories, *Report of the Conflict of Interest Review Panel* (1999).

[25] Premier Donald Morin resigned following a Report by the Conflict of Interest Commissioner that recommended he be reprimanded for seven violations of the Act. Northwest Territories, Conflict of Interest Commissioner, *In the Matter of a Complaint to the Conflict of Interest Commissioner with respect to alleged contraventions of Part III of the Legislative Assembly and Executive Council Act by the Member from Tu Nedhe* (24 November 1998), online: <http://strategis.ic.gc.ca/SSG/oe01104e.html> (date accessed: 24 January 2000).

[26] *Conflict of Interest Act*, S.N.S. 1987, c. 4.

[27] *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4.

[28] S.N.S. 1992, c. 38.

[29] Section 29(1) of the *Nunavut Act*, S.C. 1993, c. 28 as amended by *An Act to Amend the Nunavut Act and the Constitution Act, 1867*, S.C. 1998, c. 15, s. 4, provides: "Subject to this Act, on the day that section 3 comes into force, the ordinances of the Northwest Territories and the laws made under them that have been made, and not repealed, before that day are duplicated to the extent that they can apply in relation to Nunavut, with any modifications that the circumstances require. The duplicates are deemed to be laws of the Legislature and the laws made under them."

That legislation created the first position of "ethics commissioner" in Canada.[30]

On December 12, 1990, the Premier tabled guidelines setting out additional standards of behaviour for members of Cabinet and Parliamentary Assistants with respect to conflict of interest issues. On December 20th of that year, the Standing Committee on Administration of Justice was charged with the responsibility "to review and make recommendations" with respect to those guidelines. Hearings were held, and a Report on Conflict of Interest Guidelines was submitted to the House in September, 1991. The Report was not acted on until the Commissioner approached the party leaders with some additional recommendations for amending the Act.[31]

As a result of the Committee Report and the Commissioner's recommendations, the *Members' Integrity Act, 1994*[32] was passed into law in December 1994, and came into effect in October of 1995.

10. Prince Edward Island

Ontario's *Members' Integrity Act* was used as the basis for Prince Edward Island's *Conflict of Interest Act*,[33] passed in June 1999 and proclaimed in force on 1 November 1999. The new Act replaced the 1986 *Conflict of Interest Act*,[34] after the Prince Edward Island Supreme Court held that the old Act lacked an effective enforcement mechanism.[35]

11. Québec

Québec's legislative scheme differs somewhat from those of other provinces, but still shares many common features. For example, although the office of "Jurisconsult" exists, that individual does not have responsibility for administering the legislation but only for advising members as to its applicability.[36]

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[30] I. Greene, "Government Ethics Commissioners: The Way of the Future?" (1991), 34 Can. Pub. Admin. 165 at 166.

[31] E-mail from L. Morrison, Office of the Integrity Commissioner, to Jonathan Penner (24 January 2000).

[32] *Members' Integrity Act, 1994*, S.O. 1994, c. 38.

[33] *Conflict of Interest Act*, S.P.E.I. 1999, c. 22.

[34] *Conflict of Interest Act*, R.S.P.E.I. 1988, c. C-17.

[35] *Prince Edward Island (Legislative Assembly)* v. *MacAleer* (1999), 173 Nfld. & P.E.I.R. 222, 31 C.P.C. (4th) 304 (S.C.T.D.), online: QL (PEIJ).

[36] *The National Assembly Act*, R.S.Q. c. A-23.1, s. 74.

Division III of Chapter III of *The National Assembly Act*,[37] enacted in 1982, deals specifically with conflicts of interest. In addition, the Premier promulgated Conflict of Interest Guidelines in 1996 that apply only to Cabinet Ministers.[38]

12. Saskatchewan

Saskatchewan introduced the *Members of the Legislative Assembly Conflict of Interest Act*[39] in 1979. This was replaced by *The Members' Conflict of Interest Act* on 15 July 1994,[40] legislation which is broadly similar to the conflict of interest legislation in most other Canadian jurisdictions.

13. Yukon Territory

The Yukon's *Legislative Assembly Act*[41] provides for disclosure by Members of the Legislative Assembly. The *Conflict of Interest (Members and Ministers) Act*,[42] assented to on 3 May 1995, deals with other conflict of interest matters, such as withdrawal from meetings and abuse of insider information. Still in effect are a Ministers' Code of Conduct and an Executive Council Code of Ethics, both promulgated in 1981, and a Ministerial Gift Policy issued in 1994. In addition, the Territory recently passed legislation extending the ambit of the conflict of interest legislation to senior public servants.[43]

B. CANADA

The federal government, unlike all the Canadian provinces and territories, has never seen fit to adopt legislation specifically directed at conflicts of interest. Such legislation has been proposed from time to time since 1973, but has never been adopted. Instead, guidelines or codes have been promulgated by various Prime Ministers that apply only to Cabinet Ministers and, more recently, senior members of the public service. The present Conflict of Interest Code was adopted

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[37] *The National Assembly Act*, S.Q. 1982, c. 62.

[38] Québec, Le Premier ministre, *Directives aux membres du Conseil exécutif concernant les conflits d'intérêts* (29 janvier 1996).

[39] *The Members of the Legislative Assembly Conflict of Interest Act*, S.S. 1979, c. M-11.2.

[40] *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11.

[41] *Legislative Assembly Act*, R.S.Y. 1986, c. 102.

[42] *Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5.

[43] *Conflict of Interest (Members and Ministers, Public Servants and Cabinet and Caucus Employees) Act*, S.Y. 1999, c. 12.

in 1994,[44] and is implemented by an Ethics Counsellor who reports to the Prime Minister.

Presently, most rules regarding conflict of interest with respect to federal legislators are found in the *Criminal Code*,[45] the *Parliament of Canada Act*,[46] the *Canada Elections Act*,[47] the Standing Orders of the House of Commons, and the Rules of the Senate.[48] A Special Joint Committee described this patchwork of rules eight years ago as "inconsistent and hopelessly out of date".[49]

A Special Joint Committee of the House of Commons and the Senate began meeting in September 1995 to develop a new code of conduct to apply to all Members of Parliament, and issued its report and recommended code in March 1997.[50] To date, that draft code has not been enacted, nor does it appear likely that it will be in the foreseeable future.[51]

C. UNITED KINGDOM

The United Kingdom has not adopted a legislative solution to the issue of conflict of interest. Instead, like the Canadian Parliament, it relies on guidelines and codes to guide the behaviour of Members of Parliament and Cabinet Ministers. A Code of Conduct was adopted by the House of Commons in 1996.[52] In addition, various Rules Relating to the Conduct of Members

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[44]Canada, Office of the Ethics Counsellor, *Conflict of Interest and Post-employment Code for Public Office Holders* (June 1994), online: <http://strategis.ic.gc.ca/SSG/oe00002e.html> (date accessed: 24 January 2000).

[45]*Criminal Code*, R.S.C. 1985, c. C-46.

[46]*Parliament of Canada Act*, R.S.C. 1985, c. P-1.

[47]*Canada Elections Act*, R.S.C. 1985, c. E-2.

[48]Canada, Library of Parliament, Parliamentary Research Branch, *Conflict of Interest Rules for Federal Legislators* (current issue review) by M. Young (September 1999) at 5-7.

[49]Canada, Parliament, Special Joint Committee on Conflict of Interests, *Report* (June 1992), cited in M. Young, *id.* at 11.

[50]Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons* (March 1997), online: <http://strategis.ic.gc.ca/SSG/oe01106e.html> (date accessed: 24 January 2000).

[51]D. Lee, Parliamentary Secretary to the Government House Leader, speaking in the House of Commons on 16 December 1999, stated: "[T]he special committee's report was not adopted because members of parliament themselves could not agree to adopt the report. ... I am not personally aware of a great interest among hon. members in making the development of a formal code a priority at this time. I am also not aware of a special need to do it at this time": Canada, House of Commons, *Debates* (16 December 1999) at 1835.

[52]United Kingdom, House of Commons, *The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members*, online: <http://www.publications.parliament.uk/pa/cm199697/cmselect/cmstand/688/codefc.htm> (date accessed: 24 January 2000).

have been adopted by the House of Commons over time, although most postdate 1974,[53] while the House of Lords adopted a Resolution only as recently as November of 1995.[54] The most recent Ministerial Code, applicable only to Cabinet Ministers, was issued by Prime Minister Tony Blair in July of 1997.[55]

The Code of Conduct adopted by the House of Commons in July of 1996 is a very broad and general listing of principles that ought to guide the conduct of Members of Parliament, rather than specific prohibitions. The Ministerial Code of Conduct issued by the Prime Minister covers many areas of Cabinet business; part 9, "Ministers' Private Interests," sets out how Ministers are to "order their affairs so that no conflict arises or is thought to arise between their private interests (financial or otherwise) and their public duties".[56]

Along with the new Code of Conduct adopted in 1996, the House of Commons established a Standing Committee on Standards in Public Life, and appointed a Commissioner of Standards. The Commissioner's responsibilities include advising Members of Parliament on the Rules and Code, investigating complaints against Members of Parliament, and maintaining the Register of Interests.[57]

Both the House of Commons and the House of Lords require their Members to register certain financial interests in a registry that is open to the public to examine. The Commons' list of interests that must be disclosed is much more extensive than the Lords', but neither requires disclosure nearly as extensive as is required in any Canadian jurisdiction. Members of both Houses must also disclose specific relevant interests when the circumstances require it, and Lords (but not, interestingly, Members of the House of Commons) are prohibited from voting on matters in which they have an interest.

D. AUSTRALIA

To the extent that conflict of interest issues are addressed in Australia, they are generally dealt with through a code of conduct, as in the United Kingdom and the Canadian Parliament, or through a combination of constitutional provisions and standing orders of the legislature. At the federal (or "Commonwealth") level, the Constitution contains certain prohibitions, and certain

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[53] *Id.*

[54] United Kingdom, House of Lords, *The Register of Lords' Interests*, online: <http://www.publications.parliament.uk/pa/ld199697/ldinfo/ldregint.htm> (date accessed: 7 June 2000).

[55] United Kingdom, Cabinet Office, *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers*, online: <http://www.cabinet-office.gov.uk/central/1997/mcode> (date accessed: 24 January 2000).

[56] *Id.*

[57] United Kingdom, House of Commons, *supra* n. 52.

standing orders of both the House of Representatives and the Senate are relevant.[58] Members of both the House and the Senate must register their financial interests, and failure to do so is a contempt of the relevant chamber.[59] Draft codes of conduct for parliamentarians and for ministers and senior public servants were prepared in 1995, but have never been implemented.[60]

Numerous proposals have been made over the past ten to fifteen years about how to improve the ethics of Australian parliamentarians,[61] but only three Australian states have adopted extensive codes of conduct: Tasmania,[62] Victoria,[63] and New South Wales.[64] The other states rely, for the most part, on a mix of constitutional provisions and standing orders similar to those that apply at the Commonwealth level.[65]

E. UNITED STATES OF AMERICA

The U.S. House of Representatives and Senate each established standing committees on ethics, as well as written codes of ethical conduct, in the 1960s. Disciplinary proceedings against Members of Congress are taken by the appropriate House, on the recommendation of the respective committee. (Such proceedings are rare.)[66] The actions of members of the executive branch are supervised by the Office of Government Ethics, an agency established in 1978 by the *Ethics in Government Act*.[67]

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[58] L.M. Barlin, ed., *House of Representatives Practice* (Australian Government Publishing Service, 1997) at 159-66.

[59] *Id.*, at 164-66; Senate Table Office, *Standing Orders and Other Orders of the Senate* (Canberra: Senate Printing Unit, 2000) at 135-42.

[60] Australia, Parliamentary Library, Politics and Public Administration Group, *A Code of Conduct for Parliamentarians?* by Dr. A. Brien (Research Paper, 1998), online: <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp02.htm> (date accessed: 26 January 2000).

[61] *Id.*, at text accompanying endnotes 21 through 29.

[62] Australia, Parliamentary Library, *supra* n. 60, at endnote 25. The Tasmanian code was apparently closely modeled on Saskatchewan's conflict of interest legislation.

[63] Australia, Parliamentary Library, *supra* n. 60, at endnote 28.

[64] New South Wales, Legislative Assembly, *Votes and Proceedings* (8 September 1999) at 33.

[65] G. Carney, "Public Integrity of Government and Its Officials" in Commonwealth Secretariat, *1990 Meeting of Commonwealth Law Ministers and Senior Officials* (1991) 455 at 498.

[66] United States, House of Representatives, "Enforcement of Ethical Standards in Congress", online: <http://www.house.gov/rules/jcoc2ac.htm> (date accessed: 18 May 2000).

[67] United States, Office of Government Ethics, "Introduction to OGE", online: <http://www.usoge.gov/usoge001.html> (date accessed: 24 January 2000).

At the state level:

... the general practice appears to be that states and frequently counties and municipalities have their own ethics commissions of anywhere from five to nine members, generally unpaid political appointees who employ a professional ethics director with appropriate support staff. Investigations are carried out by the director and his staff who report to the full commission and the commission by majority vote then decide the course to be pursued.[68]

[68]British Columbia, Conflict of Interest Commissioner, *Annual Report 1997-98* (1998) at 18.

CHAPTER 4

REFORM OF MANITOBA'S EXISTING LEGISLATION

A. INTRODUCTION

Having reviewed Manitoba's current conflict of interest legislation, particularly in light of developments in other, primarily Canadian, jurisdictions, the Commission is convinced that the adoption of certain features of other, similar legislation would demonstrably improve the present legislation.

In conducting its review, the Commission has been mindful of the goals of conflict of interest legislation generally. One helpful articulation of those goals is as follows:

A code should aim to:

- foster trust, in parliament, parliamentarians and the system of parliamentary democracy;
- promote the functioning of parliament;
- respect the operation and status of parliament as an institution;
- be capable of being honoured, and in fact, actually work;
- refocus public attention from the conduct of parliamentarians and their ethics and place it on policy and deliberation;
- avoid litigation about powers of the code and interpretation;
- improve parliament's position as the creator of law and as a check on the executive;
- be open yet allow for the protection of privacy;
- allow for knowledge and acceptance of the code by parliamentarians and citizens;
- have stable, fair, public enforcement mechanisms;
- fit within an existing culture of discipline mechanisms;
- be, and be seen to be, impartially administered.[1]

The Commission is confident that the recommendations contained in this Report will substantially assist in meeting these goals. In particular, the Commission's guiding principle has been to make recommendations that will, if implemented, foster public trust in the Legislative Assembly as a body, individual members of that Assembly, and the system of parliamentary democracy in Manitoba.

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[1] Australia, Parliamentary Library, Politics and Public Administration Group, *A Code of Conduct for Parliamentarians?* by Dr. A. Brien (Research Paper, 1998) at 17, online: <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp02.htm> (date accessed: 26 January 2000).

Another principle that has guided the Commission in its deliberations is the principle of clarity. The Commission considers it imperative that, for the sake of the public as well as the sake of the individual members who are governed by the legislation, conflict of interest legislation should be as clearly written and accessible as possible.

Finally, the Commission has attempted to prevent the legitimate privacy interests of members from being unduly interfered with by the mechanisms set up to prevent conflicts of interest. As noted in a 1996 report in Alberta: "Conflicts of interest rules must never be so complex or onerous that they deter citizens from seeking public office."[2]

1. *The Municipal Council Conflict of Interest Act*

Given that *The Legislative Assembly and Executive Council Conflict of Interest Act* is identical in many respects to, and shares the same basic framework as, *The Municipal Council Conflict of Interest Act*, the government may wish to consider incorporating into the latter Act some or all of the recommendations in this Report. As the specific functioning of that Act is outside the scope of this Report, however, the Commission has not investigated the point further, or made specific recommendations to that effect.

B. NEW ACT

As will become apparent on a review of the recommendations made in this Report, the Commission considers that a wholesale revision of *The Legislative Assembly and Executive Council Conflict of Interest Act* is necessary. After careful consideration, the Commission has concluded that rather than revising the existing Act, it would be preferable to introduce an entirely new Act incorporating the recommendations made herein. As a result, the Commission's first recommendation is to repeal *The Legislative Assembly and Executive Council Conflict of Interest Act* and replace it with a new Act.

To further this recommendation, the Commission has prepared a draft Act, which is attached as Appendix A to this Report.

RECOMMENDATION 1

The Legislative Assembly and Executive Council Conflict of Interest Act *should be repealed and replaced with a Conflict of Interest Act in a form similar to that attached hereto as Appendix A.*

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[2]Alberta, Conflicts of Interest Review Panel, *Integrity in Government in Alberta: Towards the Twenty First Century* (1996) at 16.

C. CONFLICT OF INTEREST COMMISSIONER

The first area of possible improvement to the current legislative framework represents the single most radical change, namely the creation of an independent office of "Conflict of Interest Commissioner".

Section 20 of the present Act gives "any voter" with $300 to lodge as security for costs the right to apply for authorization to have a hearing in the Court of Queen's Bench to determine whether a member has violated the Act. If the court decides there has been a violation, the sanctions ordered may include disqualification from office or suspension.[3]

Thus the responsibility for enforcing the provisions of the Act is not left with the Legislative Assembly, but is placed in the court at the behest of individual voters. In order for a breach of the Act to result in sanctions, an interested individual must not only detect the breach, but incur the expense of pursuing a potentially lengthy and expensive judicial process, all the while bearing the onus of proving the breach to the satisfaction of the court.

Obviously this is a significant departure from traditional parliamentary practice, under which a legislature or parliament sets and enforces standards in respect of the conduct of its members. The Commission is of the view that this enforcement regime is neither appropriate nor acceptable.

> Although judges certainly have the competence, independence and profile to administer conflict rules effectively and to promote public confidence, there are several disadvantages to giving this responsibility to the judiciary. First, in most parts of Canada the judiciary is already overworked, and therefore the administration of the conflict of interest legislation is not likely to receive the attention it deserves without creating additional backlogs in the courts. Secondly, given the highly volatile political circumstances surrounding some conflict of interest allegations, judges are likely to be dragged into politics, and this can hardly be good for the image of independence and impartiality which is so important to a successful adjudicative process.[4]
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> . . .
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> History and tradition strongly support the continuation of the power of the Legislative Assembly to discipline its members. The place and function of the Assembly in our constitution support it more strongly. ... It should, in our opinion, have the ultimate power over the discipline of its members and the protection of their independence. It is therefore our view that it should be for the Assembly to make final decisions and to impose sanctions for breaches of duties and responsibilities under the conflicts of interests

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[3] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 21.

[4] I. Greene, "Government Ethics Commissioners: The Way of the Future?" (1991), 34 Can. Pub. Admin. 165 at 168.

system.[5]

Manitoba is now almost the only jurisdiction in Canada not to entrust enforcement of conflict of interest rules to an independent officer responsible to the legislature. Since the position was first created in Ontario in 1988, every province and territory (except for Nova Scotia and Québec) has charged a conflict of interest commissioner (or an individual holding an equivalent position) with the responsibility of enforcing conflict of interest rules.[6] In the case of the federal government, an ethics counsellor has been in place since 1994.[7] These officers are generally referred to as "Conflict of Interest Commissioners," although Alberta has an "Ethics Commissioner," Ontario an "Integrity Commissioner," and Newfoundland a "Commissioner of Members' Interests".

An independent commissioner charged with responsibility for enforcing conflict of interest rules has been described as "an essential feature of the ethics rules of any government that is serious about integrity".[8] The fundamental reason why this is so goes to the very purpose of the rules: politicians must not only be honest and ethical, but must be *seen* to be so. Only if the process by which rules are enforced is both meaningful and beyond reproach will the public be satisfied that the public interest is not at risk of being compromised. The fact that no member or Minister has ever been the subject of a complaint under the existing Act[9] may suggest that Manitoba's politicians are beyond reproach, but it may also suggest that the mechanisms for enforcing the Act are ineffective. Certainly there has been no shortage of public allegations of conflict of interest in recent years.[10]

Enforcement of the rules is not the only, or even the main, purpose for a conflict of interest

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[5]Alberta, Conflict of Interest Review Panel, *Report on Conflicts of Interests Rules for Cabinet Ministers, Members of the Legislative Assembly and Senior Public Servants* (1990) at 94.

[6]Even in Nova Scotia, the legislation is enforced by a "designated person," who must be a judge or retired judge of the province's Supreme Court: *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 26. In Québec, the National Assembly appoints a "jurisconsult" who is empowered to provide authoritative opinions to members on whether they are in compliance with the law. The law is enforced by a committee of the National Assembly: *The National Assembly Act*, R.S.Q. c. A-23.1, ss. 74-85.

[7]The Ethics Counsellor replaced the Office of Assistant Deputy Registrar General, which had been created in 1974 to process disclosure documentation. Unlike his provincial counterparts, the federal officer reports to the Prime Minister, because the legislation he enforces applies only to Ministers and senior public servants, not to Members of Parliament: Canada, Office of the Ethics Counsellor, *Reporting Relationship of the Ethics Counsellor* (May 1999), online: <http://strategis.ic.gc.ca/SSG/oe01113e.html> (date accessed: 24 January 2000).

[8]I. Greene and D.P. Shugarman, *Honest Politics* (1997) at 130.

[9]E-mail from P. Chaychuk, Clerk of the Legislative Assembly, Province of Manitoba, to Jonathan Penner (1 February 2000).

[10]See for instance Manitoba, Legislative Assembly, *Debates and Proceedings* (6 May 1996) at 1340; (21 October 1996) at 1350; (24 October 1996) at 1345; (28 October 1996) at 1605; (31 October 1996) at 1330; (10 December 1997) at 1345; (7 April 1998) at 1410; (9 April 1998) at 1335; (15 June 1999) at 1405; (16 June 1999) at 1400; (26 June 2000) at 1340, 1400, and 1445; (27 June 2000) at 1340, 1440, and 1550; (28 June 2000) at 1335 and 1430; (4 July 2000) at 1355, online: <http://www.gov.mb.ca/leg-asmb/hansard/> (date accessed: 16 September 2000).

commissioner. Alberta's Commissioner has described his role as "90% priest and 10% policeman,"[11] a reference to the fact that the commissioner primarily assists members with compliance, rather than investigating them for breaches of the legislation. This is borne out by the experience of other jurisdictions as well. In 1998-99, for example, the Ontario Ethics Commissioner received 241 inquiries from members seeking assistance, as compared to three referred questions requiring investigation,[12] and the British Columbia Commissioner has said:

> The function which takes up most of my working hours is the one involving frequent informal consultation, discussion and advice. ... This very informal consultation process is made use of increasingly by members of all parties and appears to be a very effective means of attaining the object for which my office was established. [13]

Currently, no person in Manitoba has the responsibility or authority to provide a definitive interpretation of the Act's requirements for members.[14] As a result, members must either seek legal advice (which may or may not correspond with a subsequent judicial finding on the same facts) or risk falling afoul of the Act's provisions. The Conflict of Interest Commissioner in Saskatchewan has described the potential quandary in which this places members:

> I had occasion to be asked by a minister who was resigning her position for advice on what she could do and what she could not do. I had to end up telling her I thought what she was proposing to do was probably okay, but the act gives jurisdiction over that to a provincial court judge. I am not at all sure why that should be so, and I am not convinced that I see any good reason for it.[15]

There can be no doubt, based on the experience of other jurisdictions, that members are faced with many situations in which they must decide whether or not they are in a conflict of interest, and act appropriately. Without informed independent advice, members may face an almost impossible task. Examples of such situations that have arisen in other jurisdictions include:

- whether holding shares in mineral exploration companies precludes a member from participating in debate on an Act respecting mining and mineral rights taxes;[16]
- whether it is appropriate for constituency staff to become members of the local

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[11]R. Clark, in G. Evans, et al., "A Roundtable on Ethics and Conflict of Interest" (1995-96), 18 Can. Parl. Rev. 25 at 29.

[12]Ontario, Office of the Integrity Commissioner, *Annual Report 1998-99* (1999) at 2 and 18.

[13]British Columbia, Conflict of Interest Commissioner, *Annual Report 1997-98* (1998) at 6.

[14]E-mail from Shirley L. Strutt, Legislative Counsel, Province of Manitoba, to Jonathan Penner (24 July 2000).

[15]D.G. McLeod, in G. Evans, et al., "A Roundtable on Ethics and Conflict of Interest" (1995-96), 18 Can. Parl. Rev. 25 at 32.

[16]Newfoundland, *Annual Report of the Commissioner of Members' Interests 1995-96* (1996) at 6.

Riding Association executive;[17]

- whether members who are, or whose spouses are, employed by the public school system are precluded from participating in debate on "back to work" legislation respecting teachers in that system;[18]
- whether a Minister may accept an invitation to open a conference, including transportation by a private company with other guests on a chartered jet paid for by the company;[19]
- whether it is appropriate to provide support as the elected representative in the constituency in areas where the member or his or her family has interests (such as schools, charitable associations, or cultural groups);[20] and
- "such varied problems as the position of MLAs who are members of professions, the proper manner of reporting changes in investment, the operation of satellite constituency offices, the necessity of disclosing the results of a successful visit to a casino, the private interest of executive assistants or constituency assistants, limitations on members who are on leave of absence from their private employment, the participation of members in certain committees, the appointment of former members of Executive Council and of the Legislature to various public bodies, the payment of members' travel expenses by charitable foundations when traveling on behalf of such foundations, the acceptance of complimentary season passes to a variety of sporting events, the writing and publishing of literary works, the acceptance by members of fees for public speeches, the participation by members in debates relating to changes in professional regulatory legislation, the professional and financial activities of members' spouses, the writing by members of letters of recommendation and letters of reference, and numerous other matters."[21]

The Commission is convinced that the position of an independent commissioner must be created for the purposes of administering, interpreting, and enforcing Manitoba's conflict of interest legislation. The value of such a position has been demonstrated over the past decade in other Canadian provinces, and its introduction in Manitoba is long overdue.

RECOMMENDATION 2

The position of Conflict of Interest Commissioner should be created, with responsibility

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[17]Ont. Office of the Integrity Commissioner, *supra* n. 12, at 9.

[18]British Columbia, Commissioner of Conflict of Interest, *Annual Report 1993-94* (1994) at 3.

[19]Ontario, Office of the Integrity Commissioner, *Annual Report 1997-98* (1998) at 11.

[20]Alberta, Office of the Ethics Commissioner, *Annual Report 1997-98* (1998) at 5-6.

[21]B.C. Conflict of Interest Commissioner, *supra* n. 13, at 9.

for administering, interpreting, and enforcing the Act.

1. Officer of Legislative Assembly

Most jurisdictions ensure the conflict of interest commissioner's[22] independence and authority by assigning the position the status of an officer of the Legislative Assembly, as are the Provincial Auditor, the Chief Electoral Officer, and the Ombudsman. This is done in recognition of the fact that the ultimate responsibility for the proper functioning of the Assembly lies with the Assembly itself:

> We are also convinced that the ultimate control over a conflicts of interests system should remain with the Legislative Assembly. The independence of MLAs is fundamental to parliamentary democracy, and the responsibility for the proper functioning of the Assembly should rest squarely upon the elected representatives of the people. While an entity other than the Assembly should administer the system, it should do so under certain clearly defined powers, and the Assembly should have the ultimate power to sanction or not to sanction its members.[23]

In British Columbia,[24] Alberta,[25] Saskatchewan,[26] Ontario,[27] Prince Edward Island,[28] and Newfoundland,[29] the Commissioner is explicitly an officer of the Legislative Assembly. In the Yukon, the Commissioner is "accountable to the Legislative Assembly".[30] The federal Ethics Counsellor is *not* an officer of Parliament, because the guidelines he or she administers apply only to Ministers and senior public servants.[31] Under the most recent proposed federal conflict of

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[22]For the sake of simplicity, the Conflict of Interest Commissioner will be referred to in this Report simply as the "Commissioner".

[23]Alta. Conflict of Interest Review Panel, *supra* n. 5, at 38.

[24]*Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 14(1).

[25]*Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 31(1).

[26]*The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 18(2).

[27]*Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 23(1).

[28]*Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 2(1).

[29]*House of Assembly Act*, R.S.N. 1990, c. H-10, s. 34(1).

[30]*Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, s. 17(1).

[31]Canada, Office of the Ethics Counsellor, *supra* n. 7.

interest code, however, the Jurisconsult *would* be an Officer of Parliament.[32]

Because the Commissioner's independence and authority are essential to the proper functioning of the office, the Commission considers it extremely important that the Commissioner be an officer of the Legislative Assembly.

RECOMMENDATION 3

The Conflict of Interest Commissioner should be an Officer of the Legislative Assembly.

2. Appointment

Given that the Commissioner should be an officer of the Legislative Assembly, the next question that needs to be addressed is how he or she will be appointed. Clearly, the position cannot be one that is filled through the normal civil service selection process; it is much too sensitive and "political" a position to permit that and, in any event, it is the Legislature itself to whom the Commissioner is accountable, not to Cabinet or any particular Minister. For the same reasons of accountability, the occupant of the office should not serve simply "at Her Majesty's pleasure," subject to dismissal by Cabinet or the Premier.

One possible method of appointment is that recommended recently by a committee of the British Columbia Legislature. The committee recommended that the Conflict of Interest Commissioner be appointed by a two-thirds majority of the Legislature, on the unanimous recommendation of a Special Committee to Appoint a Conflict of Interest Commissioner.[33] The present British Columbia legislation requires appointment by a two-thirds majority, but on the recommendation of the Premier.[34]

Prince Edward Island also provides for appointment of the Commissioner by a two-thirds majority of the Legislature, on the recommendation of the Standing Committee on Legislative Management.[35] Newfoundland's legislation requires the Premier to consult with the leader of the official opposition, and the leaders of any other political parties represented in the Legislature,

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[32]Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons* (March 1997) at 11, online: <http://strategis.ic.gc.ca/SSG/oe01106e.html> (date accessed: 24 January 2000).

[33]British Columbia, Legislative Assembly, Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills, *First Report on the Members' Conflict of Interest Act* (6 December 1999) at 28.

[34]*Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 14(2).

[35]*Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 2(2).

before the Assembly appoints the Commissioner.[36] The New Brunswick Premier must similarly consult, although the actual appointment is made by Cabinet on the Assembly's recommendation.[37]

The Commission is of the opinion that, in order to safeguard the Commissioner's independence, he or she should be appointed directly by the Legislative Assembly. The authority of the Commissioner must be recognized by all members of the Legislative Assembly. This goal is best achieved if he or she is appointed directly by the Assembly, rather than by Cabinet (as currently occurs with most Officers of the Legislative Assembly in Manitoba).[38] The appointment should be by a two-thirds majority of the Assembly, and should follow a unanimous recommendation by the appropriate committee of the Assembly, presumably the Committee on Privileges and Elections, although it may be desirable to strike a special committee for the specific purpose of selecting a Commissioner.

RECOMMENDATION 4

The Conflict of Interest Commissioner should be appointed by a two-thirds majority of the Legislative Assembly, on the unanimous recommendation of the Standing Committee on Privileges and Elections.

3. Eligibility of Incumbent

Another issue that arises in the context of appointing a Commissioner is the possibility of re-appointment. The former Commissioner in British Columbia suggested several years ago that the appointment ought to be for a single term, and not renewable.[39] This he viewed as an important safeguard of the independence and impartiality of the Commissioner. For the same reasons, a more recent review of the position by a committee of the British Columbia Legislature recommended that the Commissioner should be appointed for a single non-renewable term of six years.[40]

In actual practice, however, each of the eight provinces and three territories that have appointed commissioners permit the incumbent to be re-appointed on the expiration of his or her

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[36] *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 34(2).

[37] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 22(1).

[38] See, for example, *The Ombudsman Act*, C.C.S.M. c. O45, s. 2(1); *The Provincial Auditor Act*, C.C.S.M. c. P145, s. 2; and *The Elections Act*, C.C.S.M. c. E30, s. 5(1).

[39] British Columbia, Commissioner of Conflict of Interest, *Report (1995-96)* (1996) at 27-28.

[40] B.C. Legislative Assembly, *First Report on the Members' Conflict of Interest Act*, *supra* n. 33, at 29.

term.[41] The 1990 Alberta Report suggested that the "extreme measure" of disqualifying an incumbent from appointment as Commissioner was not necessary: "Apart from other considerations, if the reappointment is, effectively, to be an all-party process, the individual will have little interest in pleasing any one party as against another."[42] The Ontario Commissioner also recommended in 1995 that appointments should be subject to renewal.[43] The Commission sees no compelling reason to exclude the possibility of renewing the appointment of a Commissioner.

RECOMMENDATION 5

The Conflict of Interest Commissioner should be appointed for a six year term and be eligible for re-appointment on the expiry of his or her term of office.

4. Scope of Responsibilities

Commissioners typically have four primary roles. Those roles relate to: disclosure of interests; advice and guidance to members; education of members and the public; and investigation into allegations of conflict of interest.

The first role assumed by a Commissioner involves supervising the disclosure provisions of the conflict of interest legislation. He or she ensures that members file the required forms, and that the disclosure made on those forms is complete and accurate. Generally, a meeting with each member (and, usually, the member's spouse, if available) is mandatory once the forms have been filed. In most jurisdictions, the Commissioner is also required to prepare a public disclosure form for each member, based on their private disclosure, and make those forms available to the public. Presently the Clerk of the Legislative Assembly fulfils this role in Manitoba, although there is no distinction between the private and public forms, and there are no meetings with individual members.

Second, the Commissioner provides advice and guidance to individual members. When a question of interpretation of the legislation arises, the Commissioner may be asked to provide an answer. Under most conflict of interest legislation, the Commissioner is empowered to provide an authoritative answer to specific questions, and so long as the member making the inquiry makes full disclosure and follows the Commissioner's advice or recommendations, he or she is immune

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[41] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 14(3); *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 32; *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 18(4); *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 23(3); *National Assembly Act*, R.S.Q. c. A-23.1, s. 77; *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 22(3); *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 2(3); *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 34(3); *Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, s. 18(1); *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, s. 79(4).

[42] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 47.

[43] G. Evans in G. Evans, et al., "A Roundtable on Ethics and Conflict of Interest" (1995-96), 18 Can. Parl. Rev. 25 at 27.

from any penalty under the Act. Manitoba currently has no person capable of fulfilling this function.

The third role, specifically mandated by some legislation and adopted by some Commissioners even without direct authorization, is that of educating members, Ministers, and their spouses (and, in some cases, persons considering running for office) about their obligations under the Act. Educational activities can be much more wide-ranging, as well. The British Columbia Commissioner, for example, has "given talks to and conducted seminars for a wide variety of organizations including service clubs, faculties of law, political science and education at a number of universities and [has] been asked to address various groups of citizens both within and outside the province".[44] There is presently no one in Manitoba with the responsibility for carrying on such educational activities.

Finally, Commissioners bear the responsibility for enforcing the Act's provisions when allegations of misconduct arise. Typically, a referral is made to the Commissioner by an individual, another member, Cabinet, or the Legislative Assembly. The Commissioner then conducts an investigation or inquiry, and reports on the results. Normally, the Commissioner is given powers similar to those of a commission of inquiry under the applicable *Public Inquiries Act* (or equivalent statute). If, following an investigation, the Commissioner is of the opinion that a member has breached the Act, he or she will recommend a disposition to the Legislative Assembly, which makes the final decision as to disposition. In Manitoba, the only enforcement mechanism is the courts, which, for the reasons cited above, is not satisfactory.

RECOMMENDATION 6

The Conflict of Interest Commissioner should have four primary roles:

- ***(a) supervising the disclosure requirements under the Act;***
- ***(b) providing advice and guidance to members and Ministers;***
- ***(c) educating members, Ministers, and the public regarding conflict of interest rules; and***
- ***(d) investigating alleged breaches of the Act and recommending appropriate dispositions to the Legislative Assembly.***

5. Supervision of Disclosure Requirements

As set out above, one of the Commissioner's four responsibilities is the supervision of the disclosure requirements imposed on members by the Act. A detailed review of the content of those requirements appears in some detail below under "Disclosure Provisions"; here, we are concerned with the Commissioner's role in that disclosure.

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[44]B.C. Conflict of Interest Commissioner, *supra* n. 13, at 17.

At present, conflict of interest disclosure forms are filed with the Clerk of the Legislative Assembly.[45] It would not make sense to continue that practice if a Conflict of Interest Commissioner is to be appointed to administer the provisions of the Act, as members should have a single point of contact with respect to the Act.[46] The Commission therefore recommends that the forms be filed with the Commissioner.

The Commission has recommended (below, under "Disclosure Provisions") that disclosure requirements under the Act should be broadened in a number of ways. Among other things, those recommendations will require the Commissioner to review the disclosure forms completed by members, and to prepare public disclosure forms based on the completed forms.

In addition, the Commissioner ought to meet with each member (and Minister) following the completion of the private disclosure forms. The purpose of this process is "to ensure that adequate disclosure has been made and to provide advice on the member's obligations under [the] Act".[47] Such a meeting is required by most conflict of interest legislation in Canada (the exceptions being Nova Scotia, Nunavut, and the Yukon). Where a meeting is required, the member's spouse must generally also attend, if available; given the common interests inherent in domestic relationships, this practice seems eminently sensible to the Commission.

RECOMMENDATION 7

The disclosure forms required by the Act should be filed with the Commissioner, rather than with the Clerk of the Legislative Assembly.

RECOMMENDATION 8

The Conflict of Interest Commissioner should review the private disclosure forms filed by members, and prepare public disclosure forms based on those forms. Before preparing the public disclosure forms, however, the Commissioner should meet with each member and his or her spouse, if available.

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[45] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 11(1).

[46] A bifurcated regime is presently in place in Nunavut, and was until recently in the Northwest Territories. As the result of a recent review panel recommendation that this be changed, the Northwest Territories legislation was changed so that disclosure forms are filed with the Conflict of Interest Commissioner: Northwest Territories, *Report of the Conflict of Interest Review Panel* (1999) at 12; *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 87(1).

[47] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 18(6).

6. Advice and Guidance

The second primary role played by the Commissioner is that of providing advice and guidance to members. This is common to all Canadian conflict of interest legislation, and "is seen as a key component of conflict of interest legislation".[48] The importance of this role was explained in the 1990 Alberta Report:

> Ethical decisions are often difficult. Cases often fall into an ethical area which is grey rather than black and white. Ministers and MLAs frequently face such difficulties. Their difficulties are compounded by the need to preserve the appearance as well as the fact of ethical conduct. Their difficulties are further compounded by the fact that a decision made in good faith may be second-guessed later, with serious or even disastrous consequences for the career of the one who makes it. ...
>
> ... Acting on Parliamentary Counsel's advice, or the advice of any lawyer, will not prevent later charges of breaches of conflicts of interests rules. A minister or MLA should be able to obtain advice which is authoritative in the sense that one who acts upon it will be protected from later charges of a breach of conflicts of interests rules.[49]

We reviewed earlier in this Report, under the heading "Conflict of Interest Commissioner," the compelling reasons for having a Commissioner to deal with requests from members for advice and guidance. It is worth noting that over the first ten years of its existence, the Ontario Integrity Commissioner's office fielded no fewer than 1400 such requests.[50] Clearly this is an important role for the Commissioner, and it is one which is simply not being filled in Manitoba under the existing legislation.

As mentioned earlier, all other Canadian conflict of interest legislation requires the Commissioner to provide an opinion to a member, on request, as to whether a proposed course of action will violate the legislation.[51] In every jurisdiction except Saskatchewan, Newfoundland, and the Yukon, the Commissioner's opinion is authoritative, in the sense that as long as all material facts have been disclosed to the Commissioner, and the member in question follows the Commissioner's recommendations, the member cannot thereafter be found to have violated the

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[48] New Brunswick, Legislative Assembly, Standing Committee on Legislative Administration, "First Report on Conflict of Interest Legislation" in *Debates*, No. 16 (18 December 1998), online: <http://www.gov.nb.ca/legis/journal/53%2D4/981218e.htm> (date accessed: 20 January 2000).

[49] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 88.

[50] Ont. Office of the Integrity Commissioner, *supra* n. 12, at 6.

[51] Or, in Ontario and Prince Edward Island, parliamentary convention: *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 28(1); *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 7(1).

Act.[52] This is also provided for in the most recent proposed federal code of conduct.[53]

An example of the value of an authoritative opinion was described by Gary Filmon, then a member, during the debate over the Act when it was first introduced in 1983. He told of a member of the City of Winnipeg Council who had been in the habit of declaring a potential conflict of interest every time a matter concerning the Westdale area of Transcona was considered in a council meeting. It transpired that the councillor in question had a minor interest in a hotel in the area, and had approached the City Solicitor for advice.

> The City Solicitor said I don't really know, that's a difficult question. I suppose that if somebody really took it to its ridiculous extreme he could say that every time new people move into that area they are potential customers for that hotel, therefore, you should abstain from involving yourself in a vote of anything that happens in that area.[54]

Had a Commissioner been available for consultation, he or she could have advised the councillor as to what types of matters would in fact be considered conflicts of interest, and enabled the councillor to participate in all other discussions without fear of breaching the conflict of interest legislation.

Alberta,[55] New Brunswick,[56] and the Yukon[57] go further, and permit *former* members (or former Ministers) to request authoritative advice from the Commissioner. There is no reason in principle why the Commissioner, who is charged with the responsibility of administering the Act and investigating breaches of it by *any* person, should not be empowered to provide such advice. This will prevent the type of problem identified by the Saskatchewan Conflict of Interest Commissioner, who found himself unable to confirm to a former Minister that the employment activities she proposed to pursue after leaving office were not objectionable under that province's conflict of interest legislation.[58]

The Commission is persuaded that it is important that the Commissioner be authorized to provide advice and guidance to members, and that the advice given should be binding for purposes

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[52]Although even in Newfoundland, a member can only be found to have violated the Act if his or her violation was "without reasonable justification": *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 48(1).

[53]Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons*, *supra* n. 32 at 12.

[54]Manitoba, Legislative Assembly, *Debates and Proceedings* (3 June 1983) at 3438.

[55]*Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 41(1).

[56]*Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 30(1).

[57]*Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, s. 17(1)(a).

[58]McLeod, *supra* n. 15, at 32.

of the Act.

RECOMMENDATION 9

The Conflict of Interest Commissioner should be required to respond to requests from members and former members for advice and guidance as to their responsibilities under the Act. As long as the member or former member provides all material facts to the Commissioner, and complies with any recommendations made by the Commissioner, the member or former member should be rendered immune from any subsequent proceedings under the Act with respect to the transaction in question.

In Alberta, the Commissioner is also authorized to provide advice and guidance to members or former Ministers as a class, or to a sub-class of members or former Ministers.[59] This would appear to be a useful procedure, and one which could be expected to save time and effort for the Commissioner (and members) on those occasions where a particular piece of advice will be equally applicable to numerous members. Care would have to be taken, however, to ensure that the Commissioner's advice is not overly vague or broad, so as to inadvertently shelter inappropriate conduct from proceedings under the Act.

RECOMMENDATION 10

The Conflict of Interest Commissioner should be authorized to provide recommendations to members or former members as a class, or to a sub-class of members or former members. Compliance with any such recommendations should render an eligible member or former member immune from subsequent proceedings under the Act with respect to their actions.

7. Educational Activities

As discussed earlier, the Commissioner should also play a role in educating members, prospective members, and the public about conflict of interest issues. Not every jurisdiction explicitly provides for this role in its legislation, but it is obviously an important role, and one for which a Commissioner is ideally suited.

The Alberta legislation provides that the Commissioner must promote members' understanding of their obligations by personal discussions, commissioning written information about those obligations, and advising party caucuses about programs they might institute.[60] One of the means by which the Commissioner fulfils this obligation is the regular publication of an "Ethics Bulletin," dealing with particular aspects of the legislation.

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[59] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 42.

[60] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 40.

Similarly, New Brunswick's Commissioner is obliged to promote members' understanding of their obligations under the Act by personal discussion and by preparing and disseminating written information about disclosure statements.[61] He or she may also give advice or recommendations of general application to members or former members.[62] In Newfoundland, the Commissioner may, from time to time, issue summaries of the advice he or she has provided.[63] The Ontario Commissioner has regularly called on members, party caucuses, and prospective members to meet with him to learn about the requirements imposed by the Act, despite the fact that there is no specific provision in the legislation requiring such activities.[64]

Some commentators have suggested that conflict of interest commissioners have an important role to play in educating the public with respect to conflicts of interest:

> Ethics agencies need to become greater activists in the process of teaching ethics within this society. ...
>
> Governmental ethics agencies should play a leading role in [the] process [of creating a political culture sensitive to ethical concerns]. Through liaison with education administrators and school boards, these agencies should be involved in the preparation of curricula, teaching aids, case studies and information kits, all designed for differing age groups, which will convey to students an awareness of the issues surrounding governmental ethics and an understanding of the importance of ethical conduct. A complementary role can be played between these agencies and colleges and universities, with the agencies providing documentary material for academics and students wishing to conduct research on governmental ethics.[65]

A recent review of conflict of interest legislation in the Northwest Territories by a panel including two conflict of interest commissioners stated:

> One of the fundamental principles of democracy is that elected representatives are accountable to their constituents. However, such protections are only effective if members of the public know what their rights are, and are able to exercise them. The Panel is of the opinion that the Conflict of Interest Commissioner should work to increase the public profile of the office so that members of the public are aware of their right to file

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[61] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 28.

[62] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 29.

[63] *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 35(2).

[64] See for example Ontario, Office of the Integrity Commissioner, *Annual Report 1996-97* (1997) at 4; *Annual Report 1998-99* (1999) at 4.

[65] W.R. Bailie and D. Johnson, "Governmental Ethics and Ethics Agencies" (1991), 34 Can. Pub. Admin. 158 at 162-63.

a complaint and know how to access the system.[66]

The "Jurisconsult," who has been proposed to implement the federal government's code of conduct, would be empowered to "undertake educational activities for Parliamentarians *and the general public* regarding the Code of Official Conduct, the Joint Committee, or the Jurisconsult's office"[67] (emphasis added).

Undoubtedly, it is important for the Commissioner to assume an educational role. Two issues arise in this context: (1) should educational responsibilities be explicitly set out in the legislation; and (2) should they extend beyond members and potential members to the general public?

The Commission believes that the best answer to both of these questions is "yes". The Commissioner's educational role is in many ways as important as any of his or her other roles, and deserves equally prominent recognition. Extension of that role to include the education of the general public will significantly improve the Act's efficacy.

RECOMMENDATION 11

The Conflict of Interest Commissioner should be required to promote awareness and understanding by members, prospective members, and the general public of ethics in government in general, and conflicts of interest in particular, in such manner as the Commissioner deems appropriate.

8. Enforcement of the Act

The final role of the Commissioner relates to the actual enforcement of the Act's provisions. Despite all the Commissioner's efforts to advise, educate, and assist members with their responsibilities, allegations of conflict of interest will inevitably arise. When they do, the Commissioner must have the ability to respond effectively in order to satisfy the public that all such charges are dealt with appropriately. The next several sections of this Report will discuss an appropriate process for dealing with conflict of interest allegations.

9. References to the Commissioner

The first issue that needs to be addressed concerns *who* may make an allegation to which the Commissioner must respond. Currently, "any voter" may apply to the Court of Queen's Bench

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[66]N.W.T. *Report of the Conflict of Interest Review Panel, supra* n. 46, at 17.

[67]Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons, supra* n. 32, at 13.

to have a hearing with respect to an allegation that the Act has been violated.[68] Not every jurisdiction is as generous: in Saskatchewan,[69] Ontario,[70] Prince Edward Island,[71] Newfoundland,[72] and the Yukon,[73] only members, or the Legislative Assembly by resolution,[74] may request that the Commissioner investigate an alleged breach of the Act by a member. (In addition, in each of these jurisdictions other than the Yukon, the Premier[75] may request that the Commissioner investigate an alleged breach of the Act by a Minister.)[76]

In contrast, British Columbia[77] and Alberta[78] permit members of the public, along with members, the Legislative Assembly by resolution, and Cabinet to request an investigation; Nova Scotia[79] and New Brunswick[80] permit such requests to be filed by any "person" as well as (in New Brunswick) the Legislative Assembly by resolution.[81] The proposed new federal code would also permit the Jurisconsult to investigate complaints made by any member of the public.[82]

Presumably the rationale for limiting the potential sources of complaints relates to a concern regarding unfounded or spurious allegations by members of the public. The Commission is not persuaded that this is a realistic or serious threat to the integrity of the investigations process, or to the ability of the Commissioner to carry out his or her duties effectively and efficiently.

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[68] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 20.

[69] *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 29(1) and (3).

[70] *Members' Integrity Act*, 1994, S.O. 1994, c. 38, s. 30(1) and (4).

[71] *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 28(1) and (4).

[72] *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 42(1) and (3).

[73] *Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, s. 17(1)(d).

[74] The Yukon does not include such a provision.

[75] In Ontario, the Cabinet and not the Premier may make such a request: *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 30(5).

[76] *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 29(4); *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 28(5); *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 42(4).

[77] *The Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 19.

[78] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 22.

[79] *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 28(1).

[80] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 36(1).

[81] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 36(3).

[82] Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons*, *supra* n. 32, at 12-14.

The Commission agrees with the sentiments of the 1990 Alberta Report, which stated:

> One main purpose of the conflicts of interests system in general, and of the investigation system in particular, is to maintain public confidence in the integrity of the Legislative Assembly, the cabinet, and their members, that is, the political establishment. An investigation system which could be activated only by a member of that establishment is not, we think, sufficient for the purpose.
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> Our first thought was that accepting complaints from the public would open the floodgates to masses of unfounded and harassing allegations, and that a member of the public who thought something was wrong should have to persuade an MLA to bring a complaint forward. We think, however, that the Ethics Commissioner can be relied on to sift out completely unfounded allegations from those which should be investigated. ...
>
> We therefore think that members of the public should be able to bring to the Ethics Commissioner allegations of breaches of duties under the conflicts of interests system by ministers and MLAs. The only requirements should be that the complainant give his or her identity and that allegations be made in writing. An anonymous complaint should not receive any attention.[83]

Many jurisdictions explicitly grant their Commissioner the discretion to refuse to proceed with an investigation if he or she is persuaded that the complaint is frivolous or vexatious.[84] Such discretion is probably also implicit in the wording of most other jurisdictions' legislation, which typically provides that the Commissioner "may" conduct an investigation on receiving a request or complaint.

The Commission thus sees no reason to restrict the ability of any member of the public to request that the Commissioner investigate an allegation of a breach of the Act. Of course, appropriate safeguards must be in place to enable the Commissioner to refuse to investigate clearly spurious allegations. It should also be open to Cabinet to request the Commissioner to investigate an allegation against a Minister.

RECOMMENDATION 12

The Act should permit any member of the public, any member of the Legislative Assembly, or the Legislative Assembly (by resolution) to request that the Commissioner investigate an allegation that the Act has been breached by a member. The Act should also permit the Executive Council to request the Commissioner to investigate an allegation of a breach of the Act by a Minister.

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[83] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 96.

[84] See for example *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 23(4), or *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 37(4).

RECOMMENDATION 13

The Commissioner should have the discretion to refuse a request to investigate where:

(a) the request is made anonymously;
(b) he or she is satisfied that the request is frivolous, vexatious, or not made in good faith; or
(c) he or she is satisfied that there are insufficient grounds for an investigation.

Saskatchewan[85] and Newfoundland[86] also permit the Commissioner to launch an investigation on his or her own initiative. In Alberta, the Commissioner may only undertake such an investigation if he or she has reason to believe that a member has acted in contravention of advice, recommendations, or directions given by the Commissioner.[87]

The Commission is persuaded that the Commissioner should have the ability to launch an investigation on his or her own initiative, if he or she has reasonable grounds for doing so and believes that to do so would be in the public interest.

RECOMMENDATION 14

The Commissioner should have the discretion to investigate a supposed breach of the Act by a member or Minister on his or her own initiative where he or she considers it in the public interest to do so.

10. Powers of Investigation

Commissioners, as officers of the Legislature, are generally given broad powers of investigation. Typically, this is done by conferring on the Commissioner the powers and privileges of a commission, or commissioner, under the applicable *Inquiry Act*,[88] *Inquiries Act*,[89] *Public Inquiries Act*,[90] or *Public Enquiries Act*.[91] The equivalent legislation in this province is Part

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[85] *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 30(1)(b).

[86] *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 42(2).

[87] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 23.

[88] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 21(2).

[89] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 37(3).

[90] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 23(2); *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 30(3); *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 31(2)(a); *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 27; *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 29(2)(a); *Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, s. 20; *Legislative Assembly and Executive Council Act* , S.N.W.T. 1999, c. 22, s. 105(1)(b); *Legislative Assembly and Executive*

(continued...)

V of *The Manitoba Evidence Act*.[92]

The powers and privileges in question generally include the power to compel the attendance of witnesses and the production of documents, to examine witnesses under oath, and to impose a term of imprisonment for contempt.

The Commission believes that such powers are necessary if the Commissioner is to discharge his or her responsibilities effectively.

RECOMMENDATION 15

***When conducting an investigation under the Act, the Commissioner should have the powers and privileges of a commissioner under Part V of* The Manitoba Evidence Act.**

11. Remedial Powers

Once the Commissioner has completed an investigation or inquiry, and has found a breach of the Act by a member, the next issue that must be addressed concerns the appropriate remedy, and how that remedy is determined. Normally, the Commissioner will be reporting his or her findings to the Legislative Assembly. As discussed earlier, the Commissioner is an officer of the Assembly, and it is the Assembly that ultimately has the jurisdiction to discipline its members.

There are various possible penalties that a Commissioner could recommend to the Legislative Assembly, which fall into five basic categories:

(a) reprimand;
(b) fine;
(c) restitution or compensation;
(d) suspension; and/or
(e) declaring the member's seat vacant.

The existing Act does not allow for the possibility of a reprimand, but includes all of the other penalty options.[93] Most other jurisdictions do not allow for an order of restitution or

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[90](...continued)
Council Act, R.S.N.W.T. 1988, c. L-5, s. 82(2)(b).

[91]*House of Assembly Act*, R.S.N. 1990, c. H-10, s. 43(3).

[92]*The Manitoba Evidence Act*, C.C.S.M. c. E150.

[93]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 21(1).

compensation,[94] and Ontario and Prince Edward Island do not even explicitly allow for the possibility of a fine, but otherwise the list of options is fairly standard throughout Canada. The Commission is of the opinion that restitution and compensation are options that ought to be retained for appropriate circumstances, and so would recommend that all five options be available to the Commissioner (and the Legislative Assembly) as remedies.

In addition, most jurisdictions permit a further option: that the Commissioner may recommend that no penalty be imposed *if* the member in question takes specified steps to rectify the breach.[95] Such an option is in keeping with the purpose of conflict of interest legislation, which is to encourage appropriate behaviour, and not necessarily to punish members.

Finally, many jurisdictions permit (or require) the Commissioner to recommend that no penalty be imposed if he or she is satisfied that the breach in question was trivial, inadvertent, or committed in good faith.[96] This again seems to be an appropriate provision, given the goals of the legislation. It is also preferable to the existing provision, which permits the court to make an order of restitution, but no other penalty, if it determines that the member breached the Act "unknowingly or through inadvertence,"[97] a test which has been construed quite strictly by the courts in the context of municipal conflict of interest legislation.[98]

An illustration of the value of a provision regarding "trivial" interests arose recently in Ontario. The mayor of the City of Toronto, along with City Council, initiated legal proceedings against the Toronto Police Association. After the proceedings had been initiated, the Mayor became aware that the Police Association had retained a large law firm in which the Mayor's son was a partner. The Ontario *Municipal Conflict of Interest Act* deemed the Mayor's son's pecuniary interest to be *his* pecuniary interest, placing the Mayor in a conflict of interest. The court was able to rule, however, that the interest in question was so "remote or insignificant ... that it cannot reasonably be regarded as likely to influence the member".[99]

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[94]Only Nova Scotia, Newfoundland, and the Northwest Territories do: *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 29(1)(b)(iii) and (iv) and 29(6)(c) and (d); *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 45(1)(b); *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 106(1)(b)(iii) and (iv).

[95]See, for example, *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 25(1), and *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 41(2).

[96]See, for example, *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 25(2), and *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 31(6).

[97]*The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 22.

[98]See, for example, *Arbez* v. *Johnson* (1998), 126 Man. R. (2d) 271 (C.A.), although in a more recent case the Court of Appeal did in fact apply the exemption in what it termed "peculiar circumstances": *Synchyshyn* v. *Tiller*, [2000] M.J. No. 281 (C.A.), online: QL (MJ).

[99]*Toronto (City) (Mayor)* v. *Ontario* (2000), 47 O.R. (3d) 177 (Sup. Ct.), online: QL (OJ).

An important issue that arises once the Commissioner has reported to the Assembly concerns the remedial actions that may be taken by the Assembly. All Canadian conflict of interest legislation has opted for one or the other of two approaches. Under the first, the Assembly may accept the Commissioner's recommendations, reject them, or decide to impose its own sanctions. This is the approach taken in Alberta,[100] Saskatchewan,[101] New Brunswick,[102] and the Yukon Territory.[103]

Under the second approach, the Legislative Assembly may choose only to accept the Commissioner's recommendations, or to impose no penalty at all. This approach has been adopted in British Columbia,[104] Ontario,[105] Prince Edward Island,[106] Newfoundland,[107] the Northwest Territories,[108] and Nunavut.[109]

The only discussion encountered by the Commission of the rationale for either of these approaches is that by the Northwest Territories Conflict of Interest Review Panel:

> The power to discipline members is part of the inherent jurisdiction of the Legislative Assembly subject to the responsibility of the Conflict of Interest Commissioner or Adjudicator to recommend a sanction within the range set forth in Section 83 of the *Legislative Assembly and Executive Council Act* where a contravention has been found to exist. It should be open to the Members to debate whether to accept or reject that sanction. It is not the role of the Legislative Assembly to inquire further into the contravention or impose some other sanction, as the Members voting did not have the benefit of hearing the presentation of the evidence.[110]

The Commission is not persuaded that it is appropriate to "tie the hands" of the Legislative Assembly in such a manner. There is no doubt, in light of the experience of other jurisdictions,

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[100] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 27.

[101] *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 31(3).

[102] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 43(1).

[103] *Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, s. 23(3), (7), and (8).

[104] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 22(3).

[105] *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 34(4).

[106] *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 32(3) and (4).

[107] *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 46.

[108] *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 107(2).

[109] *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, s. 84(2).

[110] N.W.T. *Report of the Conflict of Interest Panel*, *supra* n. 46, at 27.

that the recommendations of the Commissioner will generally be accepted and applied, but it must remain open to the Assembly ultimately to determine how best to deal with a breach of the Act by a member.

RECOMMENDATION 16

The Commissioner should be able to recommend to the Legislative Assembly any or all of the following sanctions when he or she finds a breach of the Act by a member:

(a) a reprimand;
(b) a fine;
(c) an order of restitution;
(d) suspension of the member; and/or
(f) a declaration that the member's seat is vacant.

RECOMMENDATION 17

The Commissioner should be able to recommend to the Legislative Assembly that a member who has breached the Act not be penalized if the member rectifies the breach in a manner specified by the Commissioner.

RECOMMENDATION 18

If the Commissioner is satisfied that a member's breach of the Act was trivial, inadvertent, or in good faith, the Commissioner should be permitted to recommend to the Legislative Assembly that no penalty be imposed.

RECOMMENDATION 19

When the Commissioner finds that a member has breached the Act, the Legislative Assembly should have the option of accepting the recommendations of the Commissioner in whole or in part, imposing a different penalty or penalties, or imposing no penalty at all.

The Commission notes that section 47(b) of the *Legislative Assembly Act*[111] currently provides:

> Nothing in sections 40 to 46 ...
>
> (b) authorizes the Legislative Assembly to inquire into the conduct of any court proceeding under The Legislative Assembly and Executive Council Conflict of Interest Act or to punish any person for initiating or participating in any court proceeding under that Act.

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[111] *The Legislative Assembly Act*, C.C.S.M. c. L110.

Obviously, this provision will have to be repealed if the Assembly is to reassume responsibility for dealing with breaches of the Act.

RECOMMENDATION 20

Section 47(b) of* The Legislative Assembly Act *should be repealed.

12. Appeals

Because enforcement of the existing legislation is the responsibility of the Court of Queen's Bench, any of that court's decisions may be appealed to the Court of Appeal, and ultimately to the Supreme Court of Canada. The Act explicitly provides for the possibility of a stay of a penalty imposed by the court, pending an appeal to the Court of Appeal.[112]

In jurisdictions that have reformed their conflict of interest legislation, enforcement of the legislation is left in the hands of the Legislative Assembly, which is the approach recommended in this Report. At common law, decisions regarding such matters are not subject to appeal:

> It should be borne in mind that the House of Commons [and, by implication, Provincial Legislatures as well] has the right to regulate its own internal affairs and procedures free from any interference. This includes the right to enforce discipline on its Members by suspension, commitment and expulsion, as well as the right to administer the laws relating to its internal procedure without interference from the courts.
>
> Thus jurisdiction of the House over its Members and its right to maintain discipline within its own walls are absolute and exclusive. Therefore, even if a Member is convicted of bribery, or sentenced to imprisonment for a period longer than the life of the Parliament for an indictable offence, the Member cannot be deprived of his or her seat without a formal decision of the House.[113]

Nevertheless, two provinces (New Brunswick and Prince Edward Island) have seen fit to make it clear that there is no appeal from the Assembly's decision.[114] The Commission is persuaded that there is value in making it explicit that the legislature's decision is final and conclusive. It is worth noting that the Act already provides that a member who fails to file a disclosure statement within the prescribed time is automatically suspended, and that:

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[112] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 25(1).

[113] Canada, House of Commons, Law Clerk and Parliamentary Counsel, quoted in *Review and Recommendations of William L.M. Creaghan on the New Brunswick Conflict of Interest Act* (1997), at 24-25. See also *The Legislative Assembly Act*, C.C.S.M. c. L110, s. 40.

[114] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 43(2); *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 32(5).

> The Legislative Assembly possesses all the powers and jurisdiction necessary or expedient for investigating and determining a violation referred to in this section and for suspending or disqualifying a member under this section, and any decision by the assembly under this section is final and conclusive and is not subject to review or appeal in any court.[115]

Thus all that is necessary is to extend this provision to apply to *all* dispositions under the Act.

RECOMMENDATION 21

The Act should provide that the Legislative Assembly's decision regarding imposition of any penalty under the Act is final and conclusive and is not subject to review or appeal in any court.

13. Reporting

A final obligation of a Commissioner under virtually all Canadian conflict of interest legislation[116] is to provide the Legislative Assembly with an annual report on the activities of his or her office. In addition to keeping the Legislature informed as to the Commissioner's activities, such a report serves as a useful reminder to members of their disclosure (and other) obligations. "The tabling of annual reports to the House of Assembly on the administration of the Act keeps the issue of ethics of provincial elected representatives in the public domain."[117]

At present, the Legislative Assembly does not receive any report on members' compliance with the Act.[118] The Commission considers the filing of an annual report by the Commissioner to be a very useful and therefore desirable requirement.

RECOMMENDATION 22

The Commissioner should be required to report annually to the Legislative Assembly on the activities of his or her office.

14. Personal Liability

In order to preserve the independence and impartiality of the Commissioner, it is important

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[115] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 23(5).

[116] The sole exception is Nova Scotia, which does not have a Commissioner *per se*, but rather a "designated person".

[117] D.W. Mitchell, in G. Evans et al., "A Roundtable on Ethics and Conflict of Interest" (1995-96) 18 Can. Parl. Rev. 25 at 28.

[118] E-mail from P. Chaychuck, Clerk of the Legislative Assembly, Province of Manitoba, to Jonathan Penner (11 June 2000).

to ensure that he or she is free from possible legal harassment. To quote the 1990 Alberta Report:

> We are of the opinion that the law should protect the Ethics Commissioner from legal liability for what he or she does in carrying out his or her duties, so that he or she cannot be harassed by legal proceedings and will be able to proceed confidently. The protection should extend to his or her staff, investigators and hearing officers.[119]

Every Canadian jurisdiction with a Commissioner provides him or her with this type of protection, and the Commission is persuaded that it is an important safeguard of the process.

RECOMMENDATION 23

The Act should provide that no action lies against the Commissioner or any employee in his or her office for any act done in good faith under the Act.

The 1990 Alberta Report also recommended that the immunity be extended to any person making an allegation under the Act, or providing information and evidence in the course of an investigation.[120] Both Alberta[121] and New Brunswick[122] have incorporated such an immunity into their legislation. The Commission considers that such immunity would encourage persons who might otherwise be reluctant to bring forward evidence of breaches of the Act. Provided they do so in good faith, there is no reason why they ought not to be protected in the same manner as the Commissioner and his or her staff.

RECOMMENDATION 24

The Act should provide that no action lies against any person providing information, or giving evidence, to the Commissioner in the course of an investigation under the Act, so long as such acts are done in good faith.

15. Additional Provisions

There are, of course, additional provisions that will have to be incorporated into the Act in order to implement the introduction of the Commissioner's office. Examples include provisions regarding: confidentiality of the Commissioner's records; inability of the Commissioner and his staff to testify in any proceeding in connection with actions taken under the Act; procedures for the Commissioner's resignation or removal; and the Commissioner's remuneration. The

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[119] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 47.

[120] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 47-48.

[121] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 43(2).

[122] *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 34(2).

Commission has dealt with each of these issues in Appendix A, but we will not canvass them at length in the body of this Report, as they are relatively non-controversial and straightforward.

D. DEFINING CONFLICTS OF INTEREST

Another fundamental component of the legislation that the Commission considers requires reform is the definition of what precisely constitutes a conflict of interest. This includes the question of "apparent" conflicts of interest, exemptions from the definition, and how to deal with gifts to members.

1. Conflict of Interest Provisions

Sections 4, 7 and 8 of the present Act require members to take certain actions when matters arise in which they or their dependants have a "direct or indirect pecuniary interest," or which involve the direct or indirect pecuniary interest of a body to which they or their dependants have a "direct or indirect pecuniary liability". Where such a matter arises during a meeting, for example, the member or Minister must disclose his or her interest, withdraw without voting or participating in the discussion, and refrain from influencing the matter.[123]

The principal issue that will most often arise in applying the conflict of interest provisions is whether the matter is one in which the member or a dependant has a "direct or indirect pecuniary interest" or whether the matter affects an organization to which the member or dependant has a "direct or indirect pecuniary liability". Interpretation of the terms "direct pecuniary interest," "indirect pecuniary interest," "direct pecuniary liability," and "indirect pecuniary liability" is thus central to the application of the Act.

The existing legislation does give some guidance in this regard. The term "direct pecuniary interest" is defined in section 1 to *include* (but is not limited to) compensation paid for representing another's interests. Subsection 3(1) provides that a person shall be *presumed* to have an "indirect pecuniary interest" where that person is associated in certain ways with a person or body which has a "direct pecuniary interest". Subsection 3(4) provides that a person is *presumed* to have an indirect pecuniary liability to a second person or body where the person is associated in certain ways with a third person or body which has a "direct pecuniary liability" to the second person or body. The term "direct pecuniary liability" is not defined in the Act.

The Commission is of the opinion that the lack of clear definitions of the critical terms "direct pecuniary interest," "indirect pecuniary interest," "direct pecuniary liability," and "indirect pecuniary liability" is a problem that needs to be squarely addressed. Although there is a small

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[123] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, ss. 4(1) and 7.

body of case law which sheds some light on the correct interpretation of these terms, most members will not have easy access to that case law.

Moreover, these terms may well be ineffective to achieve one of the main objectives of conflict of interest legislation. "Direct pecuniary interest" is a term that was defined almost 200 years ago, in the context of a rule of the House of Commons, in an extremely limited way.

> Such an interest was interpreted by Mr. Speaker Abbott in 1811 in relation to an early rule of the House of Commons to the same effect, to mean:
>
> > This interest must be a direct pecuniary interest and separately belonging to the persons ..., and not in common with the rest of His Majesty's subjects, *or as a matter of state policy*.
>
> The effect of this ruling has been to render the rule against voting in respect of "direct pecuniary interests" ... practically defunct except in relation to private bills. All public bills involve matters of state policy.[124]

If this ruling were followed in Manitoba today (and there is no reason to believe it would not be, if the legislation were ever put to the test), the effect would be that the Act would not prevent a member from participating in a decision in which he or she had a direct pecuniary interest, as long as what was in issue was not a private bill.

It does not appear that any Manitoba court has ever been asked to address this issue, as no proceedings have ever been taken under the Act. Although proceedings have been taken under *The Municipal Council Conflict of Interest Act*,[125] which uses identical terminology, municipal politics does not readily admit of a "state policy" defence, and such case law is therefore of limited assistance in this area.

While it is probably not possible to define with precision the degree of interest which creates a conflict of interest, there are alternatives to the current Act's terminology that are preferable. Significantly, every jurisdiction in Canada, with the exception of the federal government and the provinces of Québec and Nova Scotia, defines conflicts of interest with reference to the "private interest" of members.[126] None of the legislation defines exactly what a

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[124]G. Carney, "Public Integrity of Government and Its Officials," in Commonwealth Secretariat, *1990 Meeting of Commonwealth Law Ministers and Senior Officials* (1991) 455 at 463-64.

[125]*The Municipal Council Conflict of Interest Act*, C.C.S.M. c. M255.

[126] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 2(1); *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 2(1); *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 3; *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 2; *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 4; *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 9; *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 21; *Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, s. 2; *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 74(1); *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, (continued...)

"private interest" *is*, although it is reasonable to assume that private interests will arise, with respect to a particular member, out of:

> ... the financial interests he or she holds, the persons or groups directly associated with the Member, and all other interests relating to his or her employment or other outside interests.[127]

Two of the three exceptions to the use of the "private interest" terminology noted above bear closer examination.

Nova Scotia prohibits members from receiving "personal benefits,"[128] and limits that term in essentially the same way that other jurisdictions limit "private interest". That is to say, its legislation defines a "personal benefit" as not including benefits that: (a) are of general public application; (b) affect a member as one of a broad class of persons; (c) concern the remuneration of the member as a member; or (d) are so remote or insignificant in their nature that they cannot be regarded as likely to influence the member.[129] Almost all conflict of interest legislation in Canada defines "private interests" to exclude the first three of these benefits, while several[130] also exclude the fourth in one way or another.

Further, Rule 21 of the House of Commons' Standing Orders, like Manitoba's present Act, prohibits Members of Parliament from voting on questions in which they have a "direct pecuniary interest," and the Rules of the Senate prohibit Senators from voting on questions in which they have a "pecuniary interest not available to the general public".[131] A proposed new Code of Official Conduct, however, would replace that terminology with the following provision, which would apply to both Houses of Parliament:

> In the exercise of their duties and functions, Parliamentarians shall not take any actions, make any decisions, or participate in making any decisions in which they know, or reasonably should know, that there is the opportunity to further, directly or indirectly, their own private interests, the private interests of a member of their family, or improperly

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[126](...continued)
s. 66(1).

[127]Alberta, Office of the Ethics Commissioner, *Ethics Bulletin*, No. 1 (January 1996) at 2.

[128]*Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 7.

[129]*Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 7(4).

[130]Alberta, Prince Edward Island, the Northwest Territories, and Nunavut: *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 1(1)(g); *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 1(g); *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 74(2); *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, s. 66(2).

[131]Canada, Senate, *Rules*, Rule 65(4).

to further another person's private interest.[132]

It is thus apparent that the trend across Canada has been to adopt the terminology of "private interest" when proscribing conflicts of interest. This has significance for Manitoba for a number of reasons, not the least of which is the ability to look to interpretations in other jurisdictions for guidance in interpreting our own legislation. While Manitoba's Act has never been interpreted by the courts, conflict of interest legislation in other jurisdictions has often been the subject of interpretation. For example, in British Columbia the Commissioner of Conflict of Interest has held that a "private interest"

> ... can include any real and tangible benefit that enures to the *personal* benefit of a member including a pecuniary interest, an economic advantage and, in some circumstances, campaign contributions and assistance, whether financial or otherwise....[133]

In another case, the Conflict of Interest Commissioner for the Northwest Territories held that:

> There is a clear difference between a private benefit to a Member and a political benefit for a Member which accrues through his efforts on behalf of his or her constituency, and which is acceptable and outside of the scope of conflict of interest legislation. [134]

The Commission believes that members of Manitoba's Legislative Assembly, and the Manitoba public, would benefit significantly from having clear and clearly defined terminology as to what constitutes a conflict of interest in the Act. The obvious means of accomplishing this end is to replace the existing definition of conflict of interest (which is unclear and has not been clarified by the courts) with a definition more in line with existing definitions in other Canadian jurisdictions.[135]

In our 1981 report on *Conflict of Interest of Municipal Councillors*, the Commission recommended against including personal, non-pecuniary interests in conflict of interest legislation.[136] At that time, we were concerned that "personal" interests could not be adequately defined, and that inclusion of interests that did not involve financial gain to a councillor was

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[132]Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons, supra* n. 32, at 6.

[133]B.C. Commissioner of Conflict of Interest, *supra* n. 18, at 12.

[134]Northwest Territories, Conflict of Interest Commissioner, *In the Matter of a Complaint to the Conflict of Interest Commissioner with respect to alleged contraventions of Part III of the Legislative Assembly and Executive Council Act by the Member from Tu Nedhe* (1998), online: <http://strategis.ic.gc.ca/SSG/oe01104e.html> (date accessed: 24 January 2000).

[135]This is what was recently recommended and adopted in the Northwest Territories: N.W.T. *Report of the Conflict of Interest Review Panel, supra* n. 46, at 18; *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 74(1).

[136]Manitoba Law Reform Commission, *Conflict of Interest of Municipal Councillors* (Report #46, 1981) at 20-21.

unwarranted "[i]n light of the quasi-criminal nature of the statutory rules".[137]

Circumstances have changed in the nearly two decades since we made that recommendation, however. The term "private interest" is increasingly clearly defined and well understood in the context of conflict of interest legislation. Such legislation is also much more widely accepted as an important method of ensuring public confidence in the integrity of the democratic system. Furthermore, in light of our recommendations respecting the appointment of a Conflict of Interest Commissioner, the risk of a member being unfairly penalized for a minor or technical breach of the statute is minimal or non-existent. For these reasons, the Commission is persuaded that conflict of interest is best defined by reference to "private interests".

RECOMMENDATION 25

The Act should define conflicts of interest with reference to the term "private interest".

As noted above, no Canadian conflict of interest legislation has attempted a definition of the term "private interest," despite the fact that the concept is at the heart of the legislation. All that has been done to date by way of legislation is to describe what is *not* a private interest.

There appears to be little, if any, discussion of the reasons behind this singular omission. It is reasonable to assume, however, that once the term has been defined, it will invite legalistic interpretations that may avoid the spirit of the Act while staying within the letter of it. The focus becomes not whether a particular interest is in fact a private interest, but rather whether it falls within the Act's *definition* of a private interest.

The Law Reform Commission of Saskatchewan noted in its 1977 Report, in a comparable context:

> The fact that members will have varying views on what should be disclosed will require a precise statement about the interests that should be disclosed. At the same time, the danger of being too specific is that significant omissions may result.[138]

The Commission is aware of the risks of defining "private interest," and has seriously considered the option of adopting the same approach as other Canadian jurisdictions, in order that the new Act could benefit from the development and interpretation of the term in other jurisdictions. At the end of the day, however, the Commission is satisfied that it is preferable to provide legislators with a definition of "private interest" in order to assist them in avoiding potential conflicts of interest. It is in the interests of clarity, to which the Commission is committed, to provide such a definition.

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[137] *Id.*, at 21.

[138] Law Reform Commission of Saskatchewan, *Report on Conflict of Interest* (1977) at 10.

Having said that, the next question is *how* to define what a "private interest" is. The first consideration is that the definition must be inclusive, rather than categorical or exhaustive. In this way, while it will provide guidance for legislators, it ought also to discourage legalistic hair-splitting and encourage compliance with the spirit of the Act.

A second factor that must be taken into account when defining the term is the fact that more than simply pecuniary interests must be included. One writer has observed:

> Most discussion of conflict of interest focuses on the advancement of pecuniary interests. Indeed at times a conflict of interest is defined solely by reference to the obtaining of a financial benefit. This narrow view of conflict of interest avoids having to deal with the wide range of non-pecuniary interests, such as, membership of a sporting, charitable, cultural or environmental body or organisation. Yet these interests are just as capable of raising a real or apparent conflict of interest which may distort government decision-making.[139]

The most helpful source of a potential definition of "private interest" is the former Commissioner of Conflict of Interest for British Columbia, E.N. Hughes, Q.C. In a 1993 opinion, he reviewed at some length the issue of what constituted a "private interest".[140] He later summarized that discussion as follows:

> That opinion involved a finding of an apparent conflict of interest, rather than an actual one. I concluded in essence the following:
>
> (a) in addition to the traditional definition of "private interest" as being pecuniary in nature, a private interest could be non-pecuniary, providing it confers a real and tangible personal benefit on the member;
>
> (b) private interest is not limited to one that is contemporaneous with or subsequent to the exercise of an official power, duty, or function by a member. At least insofar as an apparent conflict of interest is concerned, it is enough that the member be a recipient of a *past* benefit amounting to a private interest. Where a member's decision can be perceived to create a scenario, perhaps usefully described as a "quid pro quo," for past favours, that is also caught by the Act;
>
> (c) the private interest of others can also be, in some circumstances, a private interest that is attributed to the member encompassing those persons who are in a close and proximate relationship to the member where it is reasonable to assume that

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[139]Transparency International, *Conflict of Interest: Legislators, Ministers and Public Officials* (TI Working Paper) by G. Carney (1998), chap. 2, at 4, online: <http://www.transparency.de/documents/work-papers/carney/index.html> (date accessed: 16 May 2000).

[140]British Columbia, *Opinion of the Commissioner of Conflict of Interest on a Citizen's Complaint of Alleged Contravention of the Members' Conflict of Interest Act by the Honourable Robin Blencoe, Minister of Municipal Affairs, Recreation and Housing* (1993) at 28-31.

> the member would benefit directly or indirectly from the benefit to the third party.
>
> Adopting a more narrow view of private interest would not be consistent with the legislative intent.[141]

The Commission considers this a sound basis for a definition of "private interest" for purposes of the new Act.

RECOMMENDATION 26

The Act should define "private interest" to include any pecuniary or non-pecuniary interest that directly or indirectly confers a real and tangible personal benefit on a person, regardless of whether the benefit is conferred before or after the exercise of an official power or function.

2. Apparent Conflicts of Interest

Like most other conflict of interest legislation, the Act is intended to prevent *actual* conflicts of interest from arising. There has been support from time to time, however, for the idea of preventing *apparent* conflicts of interest from arising as well.

> Conflict of interest is inimical to good government in at least two important aspects. First, it taints government decisions and actions with suspicion and secondly, it fosters the growth of more serious misconduct in the nature of bribery and corruption. On the basis of this first factor, not only is an actual conflict of interest to be avoided but the mere appearance of one must also be guarded against.[142]

Preventing "apparent" conflicts of interest is regarded as an important means by which to enhance the credibility of politicians in the eyes of the public. British Columbia actually adopted a prohibition of apparent conflicts of interest in 1992.[143] That prohibition states that:

> ... a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.[144]

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[141] *Re Harcourt* (1995), 31 Admin. L.R (2d) 21 (B.C. Commissioner of Conflict of Interest) at 34.

[142] Carney, *supra* n. 124 at 456.

[143] *An Act to Amend the Members' Conflict of Interest Act*, S.B.C. 1992, c. 64, s. 2.

[144] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 2(2).

This definition of an apparent conflict of interest is derived from the 1986 report by the Honourable W.D. Parker on the Honourable Sinclair M. Stevens.[145]

The former British Columbia Commissioner of Conflicts of Interest, E.N. Hughes, Q.C., has been an enthusiastic advocate of the prevention of apparent conflicts of interest. He wrote in April 1996:

> As we move back, across this country, to a state where honour and respect for the holders of elected public office is returned to the high pedestal on which it belongs, it is important that it be portrayed that government business is being conducted in an impartial and an even-handed way. In my opinion, the *apparent conflict of interest* provision is of material assistance in achieving that goal and in enhancing public confidence in the overall integrity of government.[146]

To date, British Columbia is almost the only Canadian jurisdiction to adopt such a measure.[147] In Alberta, a review panel recommended the adoption of a similar standard in 1996,[148] but the government responded that it was "unable to develop any satisfactory wording that would address the issue of 'apparent' conflicts of interest without interfering with the fundamental right of elected officials to represent their constituents".[149]

A recent report from a distinguished panel in the Northwest Territories strongly favoured the notion of prohibiting apparent conflicts of interest.[150]

The idea also received support recently from the federal Ethics Counsellor. In an appearance before the House of Commons Standing Committee on Industry in May of 1999, Mr. Wilson stated:

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[145]As cited in Hon. E.N. Hughes, Q.C., "Apparent Conflict of Interest" in Alberta, Office of the Ethics Commissioner, *Ethics Bulletin*, No. 2 (April 1996) at 1.

[146]*Id.*, at 3.

[147]In the Yukon, the legislation prohibits members from acting in situations where "there is the opportunity, or the reasonable appearance of an opportunity" to further a private interest: *Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, s. 2. As well, the federal Code requires Ministers and senior civil servants to arrange their private affairs "in a manner that will prevent real, potential or apparent conflicts of interest from arising": Canada, Office of the Ethics Counsellor, *Conflict of Interest and Post-employment Code for Public Office Holders* (June 1994) s. 3(5), online: <http://strategis.ic.gc.ca/SSG/oe00002e.html> (date accessed: 24 January 2000).

[148]Alta. Conflicts of Interest Review Panel, *supra* n. 2, at 24-26.

[149]"Government of Alberta's response to the *Conflict of Interest Act* Review Panel Proposed Integrity in Government and Politics Act", provided by Office of Ethics Commissioner via e-mail to Jonathan Penner (2 February 2000) at 1.

[150]N.W.T. *Report of the Conflict of Interest Review Panel*, *supra* n. 46, at 18-19. The Panel did not consider it necessary for the Northwest Territories to explicitly adopt such a standard, however, as its legislation was already broad enough to cover situations of apparent conflict of interest.

> Also, the code very specifically tries to prevent real, potential, or apparent conflicts from arising. In one province they do attempt to deal with apparent conflicts. That's in British Columbia. But in the rest of the country they don't attempt to deal with it. It's a real conflict. Yet in my view the appearance of a conflict is a political reality, and if you can't in fact have a system that tries to deal with this, then it may well not serve its purpose of trying to maintain public confidence in the integrity of our political institutions.[151]

The Commission is persuaded that while a prohibition on "apparent" conflicts of interest would significantly raise the standard of conduct expected of Manitoba members, it would also enhance public confidence in the political process and the province's elected representatives. The experience of British Columbia over the past eight years suggests that such a standard is not impossible to achieve or enforce. It would in all likelihood substantially improve the effectiveness of Manitoba's legislation, and would again establish Manitoba as a leader in the field of public sector ethics.

RECOMMENDATION 27

The Act should prohibit apparent, and not only actual, conflicts of interest.

3. Exemption Provisions

Subsections 3(2), (3), (5), (6), (7), and (8) of the present Act contain a variety of "exception" provisions which at first blush appear to exempt certain matters from the application of the Act. In the Commission's opinion, these exemption provisions are unnecessarily complicated and may not serve their intended purpose.

It must be noted initially that the inconsistent language of the exception provisions is confusing. Subsections 3(2), (3) and (5) provide that in certain circumstances members "shall be presumed not" to have a direct or indirect pecuniary interest (or liability). Subsection 3(6) provides that "no person shall be presumed" to have a direct or indirect pecuniary interest or liability in certain matters. Subsection 3(7) provides that a member or minister appointed to a Crown agency "shall be presumed not" to have a direct pecuniary interest in that appointment and "shall not be presumed" solely by virtue of the appointment to have an indirect pecuniary interest in certain matters or an indirect pecuniary liability to certain parties. Finally, subsection 3(8) provides that employees of public bodies "shall not be presumed" to have an indirect pecuniary interest or liability in certain matters. Each of these subsections requires close reading to determine whether it *creates a presumption against* a pecuniary interest or liability or merely *negates a presumption in favour* of a pecuniary interest or liability.

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[151]Canada, House of Commons, Standing Committee on Industry, *Minutes* (6 May 1999) at 7, online: <http://strategic.ic.gc.ca/SSG/oe01116e.html> (date accessed: 24 January 2000).

Although the heading to subsections 3(2), (3), (5) and (6) indicate that the subsections contain "exceptions", none of these provisions create absolute exceptions but merely create or negate presumptions. Given the headings, it is questionable whether that was actually the intent of the legislation.

Some of the exception provisions can also be difficult to apply in practice. For example, subsection 3(3) provides that a person, corporation, partnership or organization shall be presumed not to have a pecuniary interest in a program, service or contract where the person, corporation, partnership or organization either represents less than 1% of those benefiting from a similar program, service or contract or obtains less than 1% of the benefit. The policy behind this "exception" would appear to be that a member should not be prevented from voting and participating in a matter merely because he or she is a citizen who will benefit in like manner common to all citizens.

This suggests that the "exception" ought to apply where the member has no special pecuniary interest in the matter, but ought *not* to apply where the member has a pecuniary interest that he or she does not share with a broad group of the citizenry. For example, the provision was probably not intended to exempt a member who is one of 150 people who will obtain a significant economic benefit from a program, service, or contract that is not available to the public as a whole.

A second difficulty with this provision is that, although titled "Exception for common interests", subsection 3(3) operates only in respect of common "benefits". In other words, the exception as currently drafted is an exception for "common benefit" rather than "common interest". There is no obvious reason to prevent members from participating or voting in respect of matters which might *adversely* affect them so long as that negative effect is shared with the majority (or some significant portion) of other citizens.

A third problem with this provision relates to the difficult task of quantifying a benefit so as to apply the mathematical calculation.

A final difficulty in applying subsection 3(3) is that neither the Act nor the case law provides a definition of "program, service or contract". For example, it is not clear whether a budgetary allocation to a government department is a program, service, or contract and therefore a matter which might be excepted under subsection (3).

A legal opinion recently tabled in the Legislative Assembly described subsection (3) as "very difficult, if not impossible, to interpret and very difficult to apply".[152]

Subsection 3(6) is also problematic. It provides that no persons shall be presumed to have a direct or indirect pecuniary interest in any matter, or a direct or indirect pecuniary liability to

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[152]Letter from J.L. Finlay, Arvay Finlay, Barristers, Victoria, B.C., to Hon. Ron Lemieux, Minister of Consumer and Corporate Affairs, Province of Manitoba (27 July 2000) at 12.

another, unless the value of the pecuniary interest or liability is $500 or more. In other words, this provision simply negates any presumption of such an interest or liability. Because no provision in the Act provides for the presumption of a direct pecuniary interest or a direct pecuniary liability, subsection 3(6) has no actual impact on the question of whether a member has a direct pecuniary interest or direct pecuniary liability.

Other jurisdictions have avoided these kinds of difficulties by steering clear of overly technical or detailed exemption provisions. Every Canadian jurisdiction that relies on a statutory code of conduct for its legislators (except the Yukon Territory) includes the following three exceptions to its conflict of interest provisions, in substantially the same language:

> "private interest" does not include an interest arising from the exercise of an official power or the performance of an official duty or function that
>
> (a) applies to the general public,
> (b) affects a member as one of a broad class of electors, or
> (c) concerns the remuneration and benefits of a member or an officer or employee of the Legislative Assembly. [153]

The Code of Conduct proposed for the federal Parliament also includes substantially identical exemptions.[154] Some jurisdictions include one or two additional exemptions. Alberta, for example, also exempts interests that are "trivial,"[155] while Nova Scotia, Prince Edward Island, the Northwest Territories, and Nunavut exempt interests that are "so remote or insignificant" that they cannot be regarded as likely to influence the member.[156]

If Manitoba were to adopt a similar list of exemptions, the problems with the current "exemptions" described above would disappear. This should be done in conjunction with the Commission's recommended adoption of the terminology of "private interest". Taken together, these steps will go a long way toward providing the Act with the clarity that is presently lacking, and which the Commission considers imperative.

RECOMMENDATION 28

The Act should provide the following exemption to the definition of "private interest":

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[153]This wording is taken from the British Columbia legislation: *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 1.

[154]Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons*, *supra* n. 32, "Interpretation," s. 2.

[155]*Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 1(1)(g).

[156]*Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 7(4); *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 1(g); *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, s. 74(2)(d); *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 74(2)(d); Legislative *Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, s. 66(2).

Interests arising from the exercise of an official power or the performance of an official duty or function that
(a) apply to the general public,
(b) affect a member as one of a broad class of electors,
(c) concern the remuneration and benefits of a member or an officer or employee of the Legislative Assembly, or
(d) are so insignificant that they are unlikely to influence the member.

4. Dependants

The present Act defines conflicts of interest not only with respect to members, but also with respect to their dependants. Thus section 4(1), for example, obliges a member to excuse himself or herself from a meeting dealing with a matter "in which [the] member or any of his dependants has a direct or indirect pecuniary interest".

"Dependant" is defined in section 1 of the Act as follows:

"dependant" means
(a) the spouse of a member or minister, including a person who is not married to the member or minister but whom the member or minister represents as his spouse, and
(b) any child, natural or adopted, of a member or minister,
who resides with the member or minister;[157]

The Commission is of the opinion that reference to a spouse as a "dependant" is no longer reflective of prevailing social norms, and that the terminology of the Act requires updating. In addition, some other jurisdictions have broadened the reach of the Act to more accurately reflect those relationships that may potentially give rise to conflicts of interest.

While there is little consistency among other provincial conflict of interest statutes, the Commission is attracted by the formulation employed by Ontario, and adopted recently by Prince Edward Island.[158] The Ontario legislation uses the term "family" in place of Manitoba's use of "dependants," and defines "family" as follows:

"family", when used with reference to a person, means,
(a) his or her spouse and minor children, and
(b) any other adult who is related to the person or his or her spouse, shares a

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[157] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 1.

[158] *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 1(e).

> residence with the person and is primarily dependent on the person or spouse for financial support.[159]

This is also broadly similar to the terminology used in Newfoundland's legislation.[160] The Commission is persuaded that this provision is preferable to the current formulation of "dependant".

The Supreme Court of Canada recently struck down[161] Ontario legislation that defined a "spouse" as

> ... *either of a man and woman* who
> (a) are married to each other, or
> (b) have together entered into a marriage that is voidable or void ... [emphasis added][162]

The Court held[163] that the legislation in question discriminated against couples of the same sex in a manner that violated their rights under the *Canadian Charter of Rights and Freedoms*.[164] The Commission is concerned that whatever definition is adopted in the new Act not discriminate in such a manner. Of assistance in this regard is the definition of "cohabitant" adopted by the Legislature in *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*[165] in 1998:

> "cohabitants" means
> (a) persons who reside together or have resided together in a family, spousal or intimate relationship, or
> (b) the persons who are the biological or adoptive parents of a child, regardless of their marital status or whether they have lived together at any time;

The joint parental status of two persons (as set out in paragraph (b) of the above definition) is not relevant to the issue of conflict of interest, but the balance of the definition would provide a good starting point for purposes of the new Act. In addition, the Commission is of the opinion that "spouse" should be replaced with more inclusive terminology, such as "cohabitant" as defined in *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*. Rather than

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[159] *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 1.

[160] *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 20(c).

[161] *M.* v. *H.*, [1999] 2 S.C.R. 3.

[162] *Family Law Act*, R.S.O. 1990, c. F3, s. 1(1).

[163] *M.* v. *H.*, *supra* n. 161.

[164] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[165] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, S.M. 1998, c. 41, s. 1.

"cohabitant", however, the Commission prefers the term "domestic partner".

RECOMMENDATION 29

The Act should define conflicts of interest by reference to a member's "family," rather than "dependants," defined as follows:

"family", when used with reference to a person, means,
(a) his or her domestic partner and minor children, and
(b) any other adult who is related to the person or his or her spouse, shares a residence with the person and is primarily dependent on the person or spouse for financial support.

"Domestic partner" should be defined in such a way as to include a person who resides or has resided with another person in a spousal or intimate relationship.

5. Professional Obligations

An issue arose recently in Manitoba that is not, to the Commission's knowledge, addressed in any extant conflict of interest legislation. The Minister responsible for *The Gaming Control Act* was accused of being in a conflict of interest because his wife, a lawyer, had done legal work on behalf of certain First Nations who were applying for Casino licences.[166] The Minister eventually was relieved of his responsibility for the gaming portfolio,[167] although he subsequently received a legal opinion stating that he was not in a conflict or apparent conflict of interest.[168]

What this controversy highlighted was the absence of any rules dealing with the professional obligation of confidentiality of the Minister's spouse. As the legal opinion noted:

> [I]t appears from an examination of the Act that knowledge of a conflict or potential conflict is not a requisite element for a Member or Minister to be found to have contravened the Act. ....
>
> ... Your spouse cannot disclose information to you regarding her practise under her Code of Professional Conduct yet you may be found to be in breach of the Act unknowingly or "through inadvertence" (s. 22 of the Act).[169]

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[166] See Finlay letter, *supra* n. 152.

[167] Manitoba, Legislative Assembly, *Debates and Proceedings* (4 July 2000) at 1400.

[168] Finlay letter, *supra* n. 152.

[169] Finlay letter, *supra* n. 152, at 11.

Clearly it would be undesirable to suggest that a member could be in a "conflict of interest" on the basis of knowledge that he or she does not have personally, and which his or her domestic partner is prevented from disclosing to the member on the basis of their own code of professional conduct. As was recently pointed out by the British Columbia Court of Appeal:

> ... A lawyer is prohibited by his duty to his or her client from disclosing confidential information to anyone (c. 5, para. 1) unless authorized by the client. Spouses clearly fall within the ambit of this prohibition. Where there is a clear rule against disclosure, and where the lawyer would run the risk of professional discipline for breach of confidentiality, I do not think any inference or presumption that a lawyer will share professional confidences with his or her spouse should arise.[170]

In order to prevent the recurrence of such a situation, the Commission is of the opinion that the new Act should make it clear that members are presumed not to have knowledge of information that their family members are under a professional obligation not to disclose to them.

RECOMMENDATION 30

The Act should provide that, in the absence of evidence to the contrary, members are presumed not to have knowledge of information that a family member is under a professional obligation not to disclose to them.

6. Gifts

Section 12(h) of the present Act requires members to disclose any gifts given to them or their dependants while they are members, along with the identity of the donors, except for gifts received from family members. Section 13(a) exempts gifts worth less than $250, unless the total value of gifts from a donor to the member and his or her dependants exceeds $250 in the previous year.

There is no attempt in the Act to define what a "gift" is, although it has been legally defined in a different context to be "the transfer of property from one to another, when it is done without recompense".[171] What is more problematic, however, is what is *not* referred to in the Act.

Manitoba's is the only conflict of interest statute in Canada that refers solely to "gifts". Every other such statute treats "fees" and "benefits" connected directly or indirectly with the member's office in the same manner as gifts, prohibiting their receipt, requiring their disclosure,

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[170] *Grabber Industrial Products Central Ltd.* v. *Stewart & Co.*, [2000] 5 W.W.R. 169 at para. 26 (B.C.C.A.).

[171] Earl Jowitt, *The Dictionary of English Law* (1959) at 864, as cited in *Dashevsky* v. *Dashevsky* (1986), 40 Man. R. (2d) 58 at 61 (Q.B.).

or some combination of the two.[172] Section 6 of Ontario's legislation, which is fairly typical of other provinces' legislation, provides as follows:[173]

> (1) A member of the Assembly shall not accept a fee, gift or personal benefit that is connected directly or indirectly with the performance of his or her duties of office.
>
> (2) Subsection (1) does not apply to,
>
> (a) compensation authorized by law;
>
> (b) a gift or personal benefit that is received as an incident of the protocol, customs or social obligations that normally accompany the responsibilities of office.
>
> (3) Within 30 days of receiving a gift or personal benefit referred to in clause (2) (b) that exceeds $200 in value, the member shall file with the Commissioner a disclosure statement in the form provided by the Commissioner, indicating the nature of the gift or benefit, its source and the circumstances under which it was given and accepted.
>
> (4) Subsection (3) also applies to gifts and benefits if the total value of what is received from one source in any 12-month period exceeds $200.[174]

The advantage of such an approach is that it ensures that members cannot be "courted" with favours and benefits that could reasonably be interpreted not to be gifts, but which if disclosed would raise concerns about possible conflicts of interest. It prevents a situation where a member could avoid the disclosure requirement by providing something, however nominal, in return for a payment that is, in substance, a gift. This is particularly significant in Manitoba because (as discussed in more detail below) the Act does not currently require members to disclose the amount or sources of their income. Such a requirement would make it more difficult to avoid the intent of the gifts rules in the Act. Presumably the intent of the "gifts" rules is similar to that of Ontario's legislation, which has been described as follows by that Province's Conflict of Interest Commissioner:

> The purpose of s. 6 of the *Act* is to prohibit a member of the Assembly from accepting a bribe as the price of influencing the member in the discharge of the member's legislative duties to take some action which would give to the donor some advantage inconsistent with the public interest and incompatible with the member's oath of office.[175]

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[172]Manitoba merely includes "fees, commission or other compensation" in the definition of "direct pecuniary interest": *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 1.

[173]*Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 6.

[174]The value at which gifts or benefits need not be reported varies from jurisdiction to jurisdiction, but is generally either $200 or $250.

[175]Ont. Office of the Integrity Commissioner, *supra* n. 12, at 13.

One shortcoming of Ontario's legislation is that it only applies to fees, gifts, and benefits received directly by the *member*. Alberta, Saskatchewan, and Prince Edward Island include both members *and* their families in their prohibition.[176] Newfoundland, and the proposed new federal Code, prohibit the acceptance of gifts by a member "directly or indirectly".[177] In the opinion of the Commission, the approach of Alberta, Saskatchewan, and Prince Edward Island is preferable, as it has the virtue of clarity and simplicity. It is also consistent with the present Act's requirement for registration of gifts received either by a member *or* any of his or her dependants.

The Commission considers that Manitoba's approach to gifts received by members is at once too narrow and too broad. Too narrow, because it merely requires registration of "gifts"; and too broad because it applies to *all* gifts given to the member or any of the member's dependants, regardless of whether they have any connection at all with the member's official duties.

RECOMMENDATION 31

The Act should prohibit the acceptance, by members or their family members, of fees, gifts, or other benefits connected directly or indirectly with the performance of members' duties of office. Acceptance of compensation authorized by law, or gifts received as an incident of the protocol, customs, or social obligations that normally accompany the responsibilities of office should not be prohibited. Gifts falling into this category, however, should be required to be disclosed if they exceed $250 in value individually or cumulatively in a 12 month period from a single source.

E. APPLICATION OF THE ACT

One of the notable features of Manitoba's conflict of interest legislation is that it applies, essentially equally, to all members of the Legislative Assembly and the Cabinet. Certain provisions also apply to former Ministers and former senior public servants. The legislation would be improved, however, if its reach were extended in certain ways and, perhaps, reduced in others.

1. Application to Ministers and Leader of the Official Opposition

The only provisions of the current Act that apply exclusively to Ministers are sections 7,

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[176] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 7(1); *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 7(1); *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 13(1).

[177] *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 26(1); Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons*, *supra* n. 32, "Gifts and Personal Benefits," s. 1.

8, 19.1, 19.2, and 19.3. Section 7 does nothing more than extend the provisions of section 4(1)[178] to Cabinet meetings, while section 8 adds that a Minister who finds himself or herself in a conflict of interest "during the exercise of any official power or the performance of any official duty or function" must delegate his or her responsibility to Cabinet, or a committee of Cabinet.

The latter three sections involve restrictions on employment that apply to both former Ministers and former senior public servants for a period of one year after leaving office, but not to members. The reason for imposing additional restrictions on Ministers and senior public servants is clear: they have, as individuals, much more opportunity to exploit their position for their own personal benefit.

> Ministers and public officials are more likely to face a direct conflict between their public duty and private interest since, unlike legislators, they exercise specific discretionary powers. For example, ... a minister may have to decide whether to renew the licence to log timber in the region in which his family's transport business operates.[179]

These sections are discussed in greater detail below, under "Outside Interests".

Alberta's Legislature has seen fit to amend that Province's *Conflicts of Interest Act* to, among other things, extend the restrictions on employment and carrying on business to the Leader of the Official Opposition. This was prompted by a review of the legislation in 1996, which stated:

> The position of Leader of the Official Opposition is significant enough to demand that she or he be subject to more stringent rules than other Members. The Leader is the object of pressure group influence. In a competitive party system as an election nears, such influence can be strong.[180]

The Commission is not persuaded that there is a pressing reason to include the Leader of the Official Opposition in the group to which the employment and business restrictions ought to apply. Although that person may well come under pressure from interest groups, he or she is not, until actually in government, in any better position than any other elected member outside Cabinet to affect the exercise of Cabinet's, or an individual Minister's, discretion.

2. Application to Senior Public Servants

As discussed earlier, sections 19.1, 19.2, and 19.3 of the present Act also prohibit certain

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[178]The requirement to disclose a conflict of interest, withdraw from the meeting, and refrain from attempting to influence the decision.

[179]Transparency International, *supra* n. 139, chap 2, at 3.

[180]Alta. Conflicts of Interest Review Panel, *supra* n. 2, at 31.

activities by *former* senior public servants. Specifically, those provisions prohibit, respectively:

(a) entering into a contract with, or accepting a benefit from, the government or a Crown agency;
(b) acting on behalf of someone in relation to a matter on which he or she had acted for or advised the government or a Crown agency; and
(c) attempting to influence or participate in deliberations of their new employer, or their new employer's relations with the government, if the new employer is someone with whom they had official dealings in the year prior to leaving office;

for one year after leaving office.

In addition, certain sections of the Act apply to former *and* current senior public servants. Section 18 prohibits the use for personal gain of "insider" information, while section 19 prohibits the improper use of influence. The only manner in which a breach of these sections may be the subject of sanctions under the Act is for a prosecution to be brought under section 30.1, as a result of which the (current or former) senior public servant is subject to a minimum fine of $1,000 (and a maximum fine of $10,000).

These provisions are almost unique to Manitoba: most other Canadian jurisdictions do not have *legislated* restrictions on public servants in the area of conflict of interest.[181] The provisions also do not leave a great deal of discretion in the hands of those responsible for enforcing the Act. There is no provision for any discipline short of a quasi-criminal prosecution, nor is there any individual or agency identified as responsible for monitoring compliance with the Act. Under these circumstances, it is likely that only the most egregious infractions will ever be pursued.

There are, of course, other statutory "conflict of interest" provisions that apply to public servants. Section 121(1)(c) of the *Criminal Code*, for example, makes it an offence to demand or accept a gift or benefit from anyone who has dealings with the government.[182] A criminal prosecution, however, is even less appropriate to deal with minor or inadvertent conflicts of interest than the procedure under the current Act.

The scope of this Report does not permit the Commission to consider in depth the application of conflict of interest rules to the public service in Manitoba. However, it may be preferable to deal with conflict of interests in the public service in a more appropriate manner.

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[181]The exceptions are New Brunswick, Nova Scotia, and Newfoundland: *Conflict of Interest Act*, S.N.B. 1978, c. 16.1, *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, *Conflict of Interest Act, 1995*, S.N. 1995, c. C-30.1. In Alberta, Ontario, the Yukon, the Northwest Territories, and Nunavut, public servants are subject to regulations promulgated under their respective Public Service Acts.

[182]*Criminal Code*, R.S.C. 1985, c. C-46.

RECOMMENDATION 32

The Government should address the problem of conflicts of interest in the public service in a separate code of conduct rather than in* The Conflict of Interest Act. *Pending the development of such a code of conduct, however, the existing provisions dealing with senior public servants should be continued in the new Act.

3. Post-Employment Restrictions

As discussed earlier, Manitoba's Act (in common with most conflict of interest regimes) imposes restrictions on what Ministers (and senior public servants) may do within a specified period after leaving office. Apart from continuing the restrictions on misuse of insider information (section 18) and abuse of influence (section 19), the present Act imposes the same restrictions on former Ministers that were discussed above with respect to senior public servants. Those provisions prohibit:

(a) entering into a contract with, or accepting a benefit from, the government or a Crown agency;
(b) acting on behalf of someone in relation to a matter on which the former Minister had acted for or advised the government or a Crown agency; and
(c) attempting to influence or participate in deliberations of a new employer, or a new employer's relations with the government, if the new employer is someone with whom the former Minister had official dealings in the year prior to leaving office;

for one year after leaving office.

A breach of any of these provisions, as with senior public servants, is a summary conviction offence and exposes the former Minister to a minimum fine of $1,000, and a maximum fine of $10,000.

Such provisions have been justified by the need to ensure that Ministers do not take advantage of their positions to "feather their nests" improperly once they have left office.

> When conflict legislation makes provision for a 'cooling-off period', citizens can be more confident that former Ministers and public officials do not have, or do not appear to have, an unfair advantage over others in influencing government. Legislating a pre-determined "cooling-off" period for elected and public officials ... would bolster the confidence of electors, and ensure that individuals do not reap unjust personal gains through the improper use of information or contacts obtained in the course of previous employment.[183]

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[183]N.B. Legislative Assembly, "First Report on Conflict of Interest Legislation", *supra* n. 48.

The "cooling off" period does not apply to former members, because "they simply do not have the influence that former Ministers and senior public servants have".[184]

In principle, these prohibitions are sound, and comparable provisions are found in all conflict of interest legislation. The time period may vary from jurisdiction to jurisdiction (in British Columbia, for example, it is two years,[185] while in Alberta it is six months[186]), and other relatively minor variations occur, but the general proscriptions are quite similar to Manitoba's.

However, there is one significant gap in Manitoba's Act that is not found in most comparable legislation. Every other Canadian jurisdiction with conflict of interest legislation (except the Northwest Territories and Nunavut) prohibits Cabinet, individual Ministers, and public servants from awarding contracts or approving benefits to former Ministers that those persons are prohibited by the Act from receiving. The Commission is of the opinion that it is important to have such reciprocal prohibitions in the Act to minimize the possibility of the policy underlying the Act being thwarted.

RECOMMENDATION 33

The Act should prohibit former Ministers, for 12 months after leaving office, from accepting a contract or benefit from any person who received a contract or benefit from a department of which the former Minister was the Minister, unless the conditions on which the contract or benefit was awarded, approved, or granted are the same for all persons similarly entitled.

There are also certain areas in which the prohibitions on former Ministers might be strengthened. In British Columbia, for example, former Ministers may *never* "make representations to the government in relation to any specific ongoing transaction or negotiation to which the government is a party and in which [they were] directly involved if the representation would result in the conferring of a benefit not for general application."[187] This does not seem to be an unreasonable limitation on the ability of former Ministers to carry on with private life after leaving office. One can readily envision the public reaction if a former Minister were permitted to lobby his or her former colleagues and staff members with respect to a project in which he or she was intimately involved, simply because twelve months have expired since he or she left office.

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[184]Manitoba, Legislative Assembly, *Debates and Proceedings* (7 December 1988) at 3894.

[185]*Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 8(4).

[186]*Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 29(1).

[187]*Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 8(7). Ontario has a virtually identical provision: *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 18(4).

RECOMMENDATION 34

The Act should prohibit former Ministers from ever making representations to the government in relation to transactions or negotiations to which the government is a party and in which they were directly involved while a Minister, if such a representation would result in the conferring of a benefit that is not for general application.

Another area that has been dealt with differently by some jurisdictions is that of participation in a new employer's dealings. Section 19.3(1) of the Act currently provides:

> Where a minister or senior public servant, after leaving office, accepts employment with a person, partnership or unincorporated association or organization with which the minister or senior public servant has official dealings during the year preceding the date on which the minister or senior public servant leaves office, the minister or senior public servant, for a period of one year following the date on which the minister or senior public servant leaves office, shall not, directly or indirectly, attempt to influence or assist or in any way participate in
>
> (a) deliberations of the employer with respect to a matter in which the employer has a pecuniary interest and in which the government or a Crown agency is involved;
>
> (b) negotiations or consultations between the employer and the government or a Crown agency;
>
> (c) the performance of obligations of the employer under a contract between the employer and the government or a Crown agency.

Section 19.3(2) stipulates that "employment" includes appointment to the governing board of a corporation, unincorporated association, or organization, as well as membership in a partnership. Section 19.4 exempts employment by governments of another province or territory, or Canada.

Ontario and Prince Edward Island have taken a much more straightforward approach to the problem that section 19.3 attempts to address. Their respective Acts provide:[188]

> A former member of the Executive Council shall not knowingly, during the 12 months after the date he or she ceased to hold office, ...
>
> (c) accept a contract or benefit from any person who received a contract or benefit from a ministry of which the former member was the minister.

Manitoba's provision is arguably more fair to former Ministers than are the provisions in Ontario and Prince Edward Island. A blanket prohibition on accepting contracts or benefits from what could sometimes be a large number of potential employers may seem draconian and unnecessary.

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[188]This specific wording is from the Ontario Act: *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 18(1). Prince Edward Island's Act is, in substance, identical, although the length of the prohibition is only six months: *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 24(1).

On the other hand, the purpose of conflict of interest legislation is to reinforce public confidence in the integrity of the political process. The restrictions imposed by section 19.3 are inherently difficult to police, and rely largely on the integrity of the former Minister and his or her new employer. It would be relatively easy for the section to be breached without anyone outside the offices of the new employer being aware of the fact. In that sense, the section may promote public cynicism, rather than public confidence in the political process.

Such a possibility is not entirely theoretical. Considerable public debate ensued in 1995 after a former senior public servant, after being responsible for significant negotiations on behalf of the government, left government service and accepted a scholarship to Harvard University from a company with links to a company with which he had been negotiating.[189] While the Ontario or Prince Edward Island legislation would not have applied to that particular individual (because he was not a Cabinet Minister), the event does serve to illustrate the type of scenario that may arise, and that such scenarios are indeed possible in Manitoba under the existing legislation.

Because of the clarity and simplicity of the Ontario and Prince Edward Island provisions, the Commission is persuaded that the adoption of a provision similar to theirs is commendable. It will, of course, always be open to the Commissioner to exempt a former Minister from these restrictions.

RECOMMENDATION 35

The Act should prohibit former Ministers, for 12 months after leaving office, from accepting a contract or benefit from any person who received a contract or benefit from a department of which the former Minister was the Minister.

F. DISCLOSURE PROVISIONS

There are, as discussed earlier, two primary methods of requiring disclosure by members: "ad hoc" disclosure when a particular conflict of interest arises, and a register of interests. These have been described as "the cornerstone of a modern conflict of interest code".[190] The following section deals only with possible improvements to Manitoba's present register of interests, as the Commission believes that the present *ad hoc* disclosure policy is satisfactory.

Sections 11 and 12 of the Act form the core of the Act's registration requirements. Section 11 requires that each member file a statement disclosing his or her assets and interests in

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[189]See Manitoba, Legislative Assembly, *Debates and Proceedings* (11 December 1995) at 1335. A subsequent investigation decided that the transaction did not violate existing conflict of interest rules, but did create a perception of conflict of interest: Canadian Press, "Civil Servant Cleared" (18 January 1996), online: QL(CP).

[190]Hon. W.D. Parker, *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens* (1987) at 348.

accordance with section 12. Section 12 contains an extensive list of assets and interests that must be disclosed. The disclosure statements must be filed with the Clerk of the Legislative Assembly within 15 days of the beginning of each legislative session. Members must also file a supplementary disclosure statement if they acquire, or dispose of, any disclosable asset or interest.

The Commission recognized in its 1981 report on municipal conflicts of interest that registration requirements are an important component of conflict of interest legislation, even though they cannot in and of themselves prevent corruption or conflicts of interest from arising:

> It must be kept in mind that the most important safeguard against conflicts of interest is oral disclosure at a meeting where a councillor's interest is under consideration. Financial disclosure is merely a supplement to oral disclosure. Registration of interests cannot prevent dishonesty or corruption, and that is not its purpose. In one sense, registration is a public relations exercise. That public relations aspect can be seen as a justification of registration rather than a criticism: it is the public interest and the public confidence in government that should be addressed.[191]

The main purpose of this sort of registry has been described in the United Kingdom as "to give public notification on a continuous basis of those pecuniary interests held by Members which might be thought to influence their parliamentary conduct or actions."[192] Members have themselves noted that the registration provisions are extremely important in the overall context of conflict of interest legislation:[193]

> Aside from the issue of what our intention is in dealing with conflict of interest, I think we should not lose sight of the fact that conflict-of-interest legislation is designed for disclosure. ... In dealing with conflict of interest, we must not forget the issue of disclosure, which is mandated in most legislation, that really does go a long way towards providing the public and the electorate with an idea of where we are coming from and where we are going.

1. Extent of Disclosure

Manitoba has chosen to specify the extent of disclosure required by setting out a lengthy list of the information that must be disclosed (in section 12), and then limiting the required disclosure to assets and interests valued at more than $500 (in section 13). Other provinces have

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[191]Manitoba Law Reform Commission, *supra* n. 136 at 34.

[192]United Kingdom, House of Commons, *The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members*, online: <http://www.publications.parliament.uk/pa/cm199697/cmselect/cmstand/688/codefc.htm> (date accessed: 18 February 2000).

[193]Commonwealth Parliamentary Association, "Conflict of Interest Guidelines: Too Little or Too Much" (1998) 21 Can. Parl. Rev. (D. Chomiak), online: <http://www.parl.gc.ca/infoparl/Vol21_1998/21n4_98e.htm> (date accessed: 16 May 2000).

chosen widely differing methods of describing what exactly must be disclosed.

British Columbia, for example, simply requires disclosure of "the nature of the assets, liabilities and financial interests of the member, the member's spouse and minor children, and private corporations controlled by any of them".[194] Alberta requires the disclosure of the same items, but also will require a statement of the income received by any of the same persons in the preceding 12 months, the income anticipated within the next 12 months, and the sources of such income,[195] in addition to the names and addresses of all persons with whom the member or Minister is "directly associated".[196]

Ontario and Prince Edward Island both require the disclosure statements filed by their legislators to:

> (a) identify the assets and liabilities of the member and his or her spouse and minor children, and state the value of the assets and liabilities;
>
> (b) state any income the member and his or her spouse and minor children have received during the preceding 12 months or are entitled to receive during the next 12 months, and indicate the source of the income;
>
> (c) state all benefits the member, his or her spouse and minor children, and any private company in which any of them has an interest, have received during the preceding 12 months or are entitled to receive during the next 12 months as a result of a contract with the Government of Ontario, and describe the subject-matter and nature of the contract;
>
> (d) if the private disclosure statement mentions a private company,
>
> > (i) include any information about the company's activities and sources of income that the member is able to obtain by making reasonable inquiries, and
> >
> > (ii) state the names of any other companies that are its affiliates, as determined under subsections 1(2) to (6) of the *Securities Act*;
>
> (e) list all corporations and other organizations in which the member is an officer or director or has a similar position; and

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[194] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 16(2)(a). A Legislative Committee recently recommended amending the B.C. Act to restrict the reporting requirement to amounts in excess of $1,000, thus bringing it more into line with Manitoba's legislation. B.C. Legislative Assembly, *First Report on the Members' Conflict of Interest Act*, *supra* n. 33, at 30.

[195] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 12, as am. by *Conflicts of Interest Amendment Act, 1998*, S.A. 1998, c. 33, s. 7.

[196] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 15.

(f) include any other information that the Commissioner requires.[197]

The advantage of Manitoba's current approach is that it defines fairly specifically what kinds of interests must be disclosed, minimizing the need for "judgement calls" by members. There are two significant shortcomings to it, however.

The first shortcoming is that the provisions are somewhat lengthy, which militates against the clarity and accessibility that all legislation (and conflict of interest legislation in particular) should employ. An example of an admirably clear provision is found in the British Columbia legislation, referred to earlier. The Ontario and Prince Edward Island provisions quoted above are also clear, if somewhat more lengthy.

The second shortcoming of Manitoba's present provisions is the possibility that by requiring disclosure of *only* the items listed, it risks allowing other assets or liabilities to "fall through the cracks" even if they would be as likely as those listed to create conflicts of interest. A specific example is discussed below, under "Income": the Act requires disclosure of persons who are remunerating a member or Minister (or any of their dependants) for their "services performed as an officer, director, manager, proprietor, partner or employee". The question that then arises (and is discussed below) is whether this requires disclosure of persons providing remuneration in return for services performed as an independent contractor. By specifically describing what must be disclosed, the Act is silent on, and does not require disclosure of, *other* interests that could be just as likely as those enumerated to create conflicts of interest.

The Commission believes that Manitoba's present approach should be reconsidered. The effectiveness of the legislation, and its ability to ensure public confidence in the integrity of members, would be enhanced by the adoption of a more global approach to registration of interests. Assuming that the Commission's recommendation regarding the appointment of a Commissioner is implemented, the Commissioner will be available to provide assistance and guidance to members in the application of the Act to particular circumstances.

RECOMMENDATION 36

The Act should require members to file a general list of "disclosable" assets and interests that will

- ***(a) identify the assets and liabilities of the member and his or her family, and state their value;***
- ***(b) state any income the member and his or her family have received during the preceding 12 months or are entitled to receive during the next 12 months, and indicate the source of the income;***
- ***(c) state all benefits the member, his or her family, and any private company in***

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[197] *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 20(2); the Prince Edward Island provision is broadly similar: *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 25(2).

which any of them has an interest, have received during the preceding 12 months or are entitled to receive during the next 12 months as a result of a contract with the Government of Manitoba, and describe the subject-matter and nature of the contract;

(d) if the private disclosure statement mentions a private company,

(i) include any information about the company's activities and sources of income that the member is able to obtain by making reasonable inquiries, and

(ii) state the names of any other companies that are its affiliates, as determined under subsections 1(2) to (7) of The Securities Act*;*

(e) list all corporations and other organizations in which the member is an officer or director or has a similar position; and

(f) include any other information that the Commissioner requires.

Obviously, these requirements would have to be interpreted and applied in such a way that no obligations of confidentiality on the part of members or their families would have to be breached.

2. Disclosure of Amounts

Members in Manitoba are not required "to estimate the value of any asset or interest disclosed".[198] Presumably the rationale for not requiring disclosure of values lies in the fact that the disclosure statements are public documents, available for anyone to view. As the 1990 Alberta Report stated:

> ... the public does not need to know the amount or value of an asset or liability or the amount of income derived from an income source. It is the *existence*, and not the *value or amount* of an interest which may create a conflict between that interest and the public duty.[199]

Other arguments have been suggested in favour of *not* requiring the disclosure of specific values:

> The arguments against [disclosing amounts] include the administrative burden it entails; a value range is sufficient; not a register of wealth; and the description of the interests in many cases indicates their value, such as, land and shares. These arguments together with the fact that the revelation of the interest, whatever its value, exposes any potential conflict of interest, suggest that no declaration of value is warranted. The adoption of minimum thresholds before interests are required to be declared assists this stand.[200]

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[198] *The Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 13(c).

[199] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 65.

[200] Carney, *supra* n. 124, at 475.

Manitoba's present approach is also followed in British Columbia[201] and Nova Scotia.[202] The former British Columbia Commissioner of Conflict of Interest has suggested that this approach has aided in obtaining the co-operation of members and their spouses.[203]

All other jurisdictions in Canada, however, require disclosure of values. For the most part, concerns about privacy are addressed by requiring disclosure of amounts on a private disclosure statement that is filed with a conflict of interest commissioner.[204] The Commissioner then prepares a public disclosure statement that lists only the source and nature of the income, assets, and liabilities disclosed, and does not include values.[205] The Newfoundland Conflict of Interest Commissioner has observed that the initial reluctance of legislators to provide such detailed disclosure has dissipated.

> In actual practice, however, the negative reaction about extensive filing has moderated with each successive annual filing. This may reflect greater acceptance of the fact that disclosure is a necessary requirement of serving in public office. It may also suggest a greater appreciation by members of the mutual benefit to be gained from their periodically focusing attention on interrelationships between public duties and private interests.[206]

While it is reasonable not to expect members to make public the precise value of all their assets and interests, the advisory and enforcement aspects of the Commissioner's role are rendered much more effective if the Commissioner is given detailed information on interests in advance. This issue was canvassed by the Alberta Conflict of Interest Review Panel in 1990, which recommended that members be required to make *full* disclosure to an Ethics Commissioner.[207]

The Commission takes the same position. Clearly, the appointment of a conflict of interest commissioner would be a prerequisite to requiring members to make disclosure of the value of

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[201] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 16.

[202] *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 6.

[203] Hon. E.N. Hughes, Q.C., in G. Evans, et al., "A Roundtable on Ethics and Conflict of Interest," (1995-96), 18 Can. Parl. Rev. 25 at 30.

[204] The only exceptions are the Yukon Territory and the federal government. The Yukon *Legislative Assembly Act* requires disclosure of values only with respect to "any benefit under any contract or agreement with the Government of the Yukon": *Legislative Assembly Act*, R.S.Y. 1986, c. 102, s. 7(2)(e). The current federal Code requires public disclosure of the value of all "declarable" assets: Canada, Office of the Ethics Counsellor, *supra* n. 147, at 6-7. The most recent proposed revision of the federal Code would require private, but not public, disclosure of values of all interests: Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons, supra* n. 32, at 9.

[205] In New Brunswick and Newfoundland the commissioner may, if it is in the public interest, identify specific interests as being "nominal," "significant," or "controlling": *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 20(3); *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 37(3).

[206] Mitchell, *supra* n. 117, at 28.

[207] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 66-68.

their interests. Once the office of Commissioner has been created, the Commissioner would be in a position to screen the private disclosure statements and ensure that the information on the *public* disclosure statements was accurate and complete and did not infringe unnecessarily on the privacy interests of members.

RECOMMENDATION 37

The Act should require members to disclose the value of their interests on a private disclosure statement. The private disclosure statement should be screened by the Commissioner to remove any reference to the values in the process of creating a public disclosure statement.

3. Income

Subsection 12(d) of the Act requires members to disclose the name of every person, corporation, subsidiary of a corporation, partnership, or organization which remunerates the member or any of his or her dependants for services performed as "an officer, director, manager, proprietor, partner or employee".

As mentioned earlier, it is not at all clear whether this section is also intended to require disclosure of persons or corporations that remunerate the member for services performed as an independent contractor, such as a consultant. Certainly, a member could reasonably interpret the provision as *not* requiring disclosure of such sources of income.

Most other jurisdictions in Canada have dealt with this issue by simply requiring disclosure of "income". The notable exceptions are British Columbia and the federal government, although the most recent proposed federal Code *would* require disclosure of income.[208] Ontario, for example, requires the disclosure statement to:

> state any income the member and his or her spouse and minor children have received during the preceding 12 months or are entitled to receive during the next 12 months, and indicate the source of the income.[209]

In Nova Scotia, members must disclose:

> the name of every individual or organization that in any manner whatsoever remunerates or contributes to the member or the member's spouse or dependent children and includes

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[208]Canada, Parliament, *Second Report of the Special Committee on a Code of Conduct of the Senate and the House of Commons*, *supra* n. 32, at 9.

[209]*Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 20(2)(b).

any reimbursement for expenses made to any of them.[210]

There is clearly an emerging consensus across the country that disclosure of income, and not just assets or liabilities, is desirable and promotes the goal of preventing conflicts of interest from arising. Manitoba's current approach, of enumerating certain sources of income that must be disclosed, simply leaves too many possibilities for avoidance, whether deliberate or inadvertent. The Commission therefore believes that the Act's definition should be clarified to remove ambiguity.

Like Ontario, Alberta and Prince Edward Island require disclosure of income not only for the prior year, but also for the *coming* year. Other jurisdictions merely require the disclosure of income as at the time of filing of the disclosure statement, or over the preceding twelve months. Obviously the latter approach is somewhat less onerous than the former, and does not invite speculation. Nevertheless, a member should generally have a fairly good idea of the significant sources of income on which his or her family will be relying in the upcoming year. In any event, the disclosure statement is by necessity forward looking; if the member or one of his or her dependants begins receiving income from a source that was not already disclosed, the member will be required to file a supplementary statement. In that sense, requiring disclosure of anticipated sources of income does not place any more onerous an obligation on members.

The Commission is persuaded that the approach taken by Ontario, Alberta, and Prince Edward Island is preferable, and best meets the goals of the Act.

RECOMMENDATION 38

The Act should require members to disclose to the Commissioner all the income they and their family members have received in the previous twelve months, or expect to receive in the upcoming twelve months.

For the reasons discussed above under "Extent of Disclosure," it is desirable to require members to disclose not just the *sources*, but also the *amounts* of income received by themselves and their families.

4. Public Availability of Disclosure Information

Obviously, disclosure of members' interests does not have much meaning unless the disclosure is, in some sense, to the public at large. The purpose of such disclosure, after all, "should be, so far as practicable, to enable the public, or any member of the public, to determine whether or not an action of a minister or MLA has benefited, or might have been expected to

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[210] *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 6(1)(a).

benefit, a private interest of the minister or MLA."[211] To the extent that the system of disclosure fails in this purpose, it must be changed.

Under the present Act, the Clerk of the Assembly must make disclosure statements available to any person without charge during normal business hours.[212] As a matter of policy, however, this does *not* include allowing the photocopying of the statements, and interested persons must physically attend to the Clerk's office at the Legislature in Winnipeg.[213]

The need to actually visit the Legislature obviously limits the utility of disclosure, as constituents of rural members will have limited access to the disclosure forms. This is particularly true of voters located in the northern half of the province, but anyone residing outside the City of Winnipeg is, to some extent, disenfranchised as a result of this policy, as may be those whose mobility is limited. As a committee of the New Brunswick Legislative Assembly recently observed:

> Failing to provide public disclosure statements can be seen by the public as an attempt to withhold information. This negative perception only serves to weaken the confidence of the electorate in their elected representatives and in the impartiality of the legislative process. Such a result would undermine the purpose of conflict of interest legislation.[214]

The refusal to permit photocopying of statements is likewise a restriction on the public's ability to determine whether or not a member is, or may be, in a position of conflict of interest. Ontario, New Brunswick, Nova Scotia, Prince Edward Island, the Northwest Territories, and Nunavut all provide specifically in their legislation that any member of the public is entitled to obtain photocopies of disclosure statements on request, and on payment of a prescribed fee.[215]

The federal Ethics Counsellor has gone one step further, and made all information disclosed by federal public office holders available on the Internet.[216]

The Commission is persuaded that increased public accessibility of members' disclosure statements is vital to the maintenance of public confidence in the honesty and integrity of the

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[211] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 62.

[212] *Legislative Assembly and Executive Council Conflict of Interest Act*, C.C.S.M. c. L112, s. 17.

[213] E-mail from P. Chaychuk, Clerk of the Legislative Assembly, Province of Manitoba, to Jonathan Penner (1 February 2000).

[214] N.B. Legislative Assembly, "First Report on Conflict of Interest Legislation", *supra* n. 48.

[215] *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 21(7); *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 20(8); *Members and Public Employees Disclosure Act*, S.N.S. 1991, c. 4, s. 5(5); *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 26(8); *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 89(3); *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, s. 78(2).

[216] At <http://strategis.ic.gc.ca/SSG/oe01048e.html>.

Manitoba Legislative Assembly. The present restrictions on accessibility to a large degree render disclosure little more than window dressing.

RECOMMENDATION 39

Public disclosure statements filed by members should be made more accessible to the public. Members of the public should be furnished with photocopies of disclosure statements on request, and consideration should be given to making the statements available on the Internet.

5. Disclosure Forms

One way of encouraging members to regularly make complete and accurate disclosure as required by the Act is to ensure that the disclosure forms are as clear and "user friendly" as possible. While there has been no suggestion that the present forms present any particular difficulty, there is no provision in the present Act for their regular review and updating. Such a provision was suggested in a recent review of New Brunswick's legislation,[217] and it is one that makes eminent sense to the Commission.

Some members have also suggested that they should not be required to fill out a new disclosure form in complete detail at the start of every legislative session if they have no revisions or amendments to forms filled out in the previous session. These members suggest that in such cases they should simply be required to sign a form indicating that there are no revisions to the form filed in the previous session.[218] The Commission is persuaded that such an option should be available to members.

RECOMMENDATION 40

Disclosure forms should be reviewed and updated on a regular basis. Members should also be given the option of filing a form indicating that there have been no changes to their previously disclosed interests.

G. OUTSIDE INTERESTS

Regardless of the undoubted merits of disclosure, disclosure in and of itself cannot be relied on to prevent all conflicts of interest from arising. This leads us to another area in which the present Act is lacking, dealing with outside interests of Ministers.

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[217]N.B. Legislative Assembly, "First Report on Conflict of Interest Legislation", *supra* n. 48.

[218]E-mail from P. Chaychuk, Clerk of the Legislative Assembly, Province of Manitoba, to Jonathan Penner (1 February 2000).

A Minister with business or employment interests outside government may well find himself or herself in occasional conflicts of interest – as, indeed, may any member. In the case of a Minister, however, the conflict is potentially much more serious, because of his or her executive responsibilities and the discretionary administrative power he or she may exercise. In addition, continuing employment or business interests may interfere with the Minister's ability to devote his or her full attention to the responsibilities of government. A Minister who is also a director of a company or other organization may easily be compromised as a result of the fiduciary obligations owed to the company or organization.

Every other Canadian jurisdiction (except Nova Scotia) deals with this potential problem in one way or another, but Manitoba's present Act does not. A typical example is found in the British Columbia Act:[219]

> A member of the Executive Council must not
>
> (a) engage in employment or in the practice of a profession,
>
> (b) carry on a business, or
>
> (c) hold an office or directorship other than in a social club, religious organization or political party
>
> if any of these activities are likely to conflict with the member's public duties.

A similar or identical provision is found in virtually all other Canadian conflict of interest legislation.[220] The approaches taken vary somewhat in detail, but in essence they all prohibit Ministers from the following activities *if* the activities are likely to conflict (or be seen apparently to conflict) with the Minister's public duties:

(a) engaging in employment or the practice of a profession;
(b) managing the business of a corporation;
(c) carrying on business through a sole proprietorship or partnership;
(d) holding an office or directorship; or
(e) holding or trading in stocks, securities, futures, or commodities.

The potential for a direct conflict of interest when a Minister has business or employment interests outside government is obvious, particularly where there is some relationship between those interests and the Minister's official responsibilities. It is patently undesirable to make conflict of interest provisions so onerous that talented men and women decide against serving in government because of the interference with their personal lives and means of earning a livelihood outside government. At the same time, however, the interests of the public in fair and honest government must be recognized. Virtually every other Canadian jurisdiction has recognized the importance of restricting the outside pecuniary interests of Ministers, and it is the Commission's

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[219] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 9(1).

[220] Nova Scotia and Québec are the only exceptions, although a similar restriction is found in Québec: Québec, Le Premier ministre, *Directives aux membres du Conseil exécutif concernant les conflits d'intérêts* (29 janvier 1996) s. 1.

opinion that Manitoba should introduce similar restrictions. The Commission believes that not to place any restrictions on such interests creates an unacceptable risk of direct conflicts of interest.

RECOMMENDATION 41

Ministers should be prohibited from engaging in any of the following activities if and to the extent that the activity is likely to create a conflict between their private interests and their public duties:

(a) engaging in employment or the practice of a profession;
(b) managing the business of a corporation;
(c) carrying on business through a sole proprietorship or partnership;
(d) holding an office or directorship; or
(e) holding or trading in stocks, securities, futures, or commodities.

In some jurisdictions, the Commissioner is given discretion to permit a Minister to carry on an activity if he or she complies with certain conditions, such as placing assets into a blind trust (discussed below).[221] The Commission believes that such a provision would introduce enough flexibility into the system to allay the concerns of people who might otherwise be dissuaded from accepting a Ministerial position.

RECOMMENDATION 42

The Commissioner should be empowered to permit a Minister to engage in an activity that would otherwise be prohibited, on conditions if necessary, if the Commissioner is satisfied that the activity will not create a conflict of interest between the Minister's private interests and his or her public duties.

1. Blind Trusts

Some jurisdictions deal with prohibited Ministerial activities (such as carrying on a business or holding stocks or securities) by permitting Ministers to commit the assets in issue to a "blind trust". Under such an arrangement, the trustee manages the Minister's business (or securities, or whatever is being held in the blind trust) without input from the Minister. The Minister remains beneficially entitled to whatever property is in the trust, but (theoretically at least) unaware of what that property is. The theory is that under such an arrangement the Minister will not be in a conflict of interest when dealing with matters that could affect the assets in the trust, because he or she does not actually know what those assets are.

Most Canadian jurisdictions permit Ministers to utilize some form of the blind trust. In Alberta, Ministers may not own or have a beneficial interest in publicly traded securities unless

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[221] See, for example, *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 13.

they are either held in a blind trust or the Commissioner approves.[222] The blind trust arrangements must be approved by the Commissioner, and must preclude the Minister from having any knowledge of the specific investments in the trust.[223] In addition, the trustee is only permitted to invest in certain types of securities.[224]

Saskatchewan[225] and British Columbia[226] permit Ministers to entrust their business interests to blind trusts. The trustees are not permitted to consult with the Minister with respect to managing the trust property, but must report all material changes in assets, liabilities, and financial interests to the Minister and the Commissioner.

In Ontario, blind trusts may be utilized either to hold securities[227] or to manage a business[228] on behalf of a Minister. The trustees of such trusts must keep the Commissioner informed of their activities, but may only give the Minister sufficient information to permit him or her to submit income tax returns.

Despite their advantages, there is some reason to believe that blind trusts may not fully protect Ministers from the possibility of a conflict of interest:

> There is a strong case for the view that a private blind trust could be a façade behind which the conflict of interest can survive due to the difficulty of creating a 'truly blind trust' of assets of all types in the hands of trustees ....[229]

An early and extremely influential conflict of interest inquiry recommended the abolition of blind trusts, on the basis that they can never be truly "blind":

> In sum, I do not believe there is value in including in a conflict of interest code a trust mechanism that may easily be misunderstood and misapplied. To my mind, the hard decisions about which assets can be retained and which have to go must be made, and those that have to be divested should truly be divested. ...

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[222] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 19.

[223] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 1(7).

[224] *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 1(7)(c)(iv).

[225] *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 9(8).

[226] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 9(4).

[227] *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 11(3).

[228] *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 12(2).

[229] Australia, Parliamentary Library, Economics, Commerce and Industrial Relations Group, *Conflicts of Interest Avoidance - Is There a Role for Blind Trusts?* (Current Issues Brief) by B. Pulle (1996) at 2, online: <http://www.aph.gov.au/library/pubs/cib/1996-97/97cib14.htm> (date accessed: 26 January 2000).

> The only way that a blind trust can work as a legitimate vehicle for divestment is if its "blindness" can be ensured. The only way that blindness can be ensured is by strictly limiting the kinds of assets or interests that can be placed into a blind trust. ... In my view, the only assets that should be placed into a blind trust are those that can truly and easily be sold by an arm's length trustee, such as publicly traded securities. The blind trust should never be used for any other kind of holding, and certainly not for anything like a family business or family firm.[230]

Clearly, this view is not shared by most Canadian jurisdictions, probably because the blind trust is not relied on, in and of itself, to prevent conflicts of interest from arising. Generally speaking, Ministers must declare all of their interests on their disclosure statement, whether or not they are in a blind trust, and they must not participate in meetings or decisions regarding matters in which they are aware they have a private interest. Cumulatively, these circumstances will go a long way toward ensuring that even though a blind trust may not be truly "blind," that fact will not result in a conflict of interest for the Minister.

Given the limited role that blind trusts play in most Canadian jurisdictions, and the fact that additional provisions are in place to ensure public awareness of potential conflicts of interest, the Commission is persuaded that blind trusts may play a useful role in Manitoba. It is not persuaded, however, that such trusts ought to be available for the management of business interests. Rather, such interests, if they truly are likely to result in a real or apparent conflict of interest for a Minister, ought to be divested.

RECOMMENDATION 43

Ministers should be permitted to entrust securities, stocks, futures, or commodities to a trustee, if the following conditions are met:

(a) ***the trustee and the terms of the trust are approved by the Commissioner;***
(b) ***the trustee has no relationship with the Minister that would affect or appear to affect the discharge of the trustee's duties; and***
(c) ***the terms of the trust preclude the Minister from having any knowledge of the specific investments in the trust.***

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[230]Parker, *supra* n. 190, at 352.

2. Expenses Incurred

The legislation in Ontario[231] and Prince Edward Island[232] permits Ministers who are required to set up blind trusts to be reimbursed for the costs of doing so, as does the federal code.[233] As the blind trust is imposed on a Minister by law in order to safeguard the public interest, without the necessity of an *actual* conflict of interest being established, it does not seem unreasonable that the costs of doing so should be borne by the public.

RECOMMENDATION 44

Ministers should be entitled to reimbursement of reasonable fees and expenses actually paid for the cost of establishing a blind trust in accordance with the Act.

H. STATEMENT OF PRINCIPLE

One notion that has been discussed from time to time in some jurisdictions, and has in fact been introduced in others, is that of including in conflict of interest legislation a statement of ethical principles. Such a statement would place a greater onus on legislators than simply that of staying within the letter of the law regarding conflict of interest. The rationale has been eloquently described by Hon. E.N. Hughes, Q.C., the former Commissioner of Conflict of Interest in British Columbia:

> However, what I have come to realize as I have performed this job over a five year period is that conflict of interest is only one aspect, one component if you like, of honour, trust and integrity and morality in public service. What I believe should occur is for existing legislation ... to embrace the wider gamut of honour, trust and integrity in public service in the same way as legislation has embraced the concept of conflict of interest.[234]

Commissioner Hughes recommended[235] the adoption in British Columbia of a principle similar to that found in the federal Code of Conduct:

> Public office holders shall act with honesty and uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of

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[231] *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 12(2)6.

[232] *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 19(3).

[233] Canada, Office of the Ethics Counsellor, *supra* n. 147, at 15.

[234] B.C. Commissioner of Conflict of Interest, *supra* n. 39, at 8.

[235] B.C. Commissioner of Conflict of Interest, *supra* n. 39, at 9.

government are conserved and enhanced.[236]

The 1990 Alberta Report recommended the inclusion of "general ethical principles" in the conflict of interest legislation,[237] citing the following reasons:

> First, fairness requires that the law tell people what their duties are. If ministers and MLAs who are accused of breaches of ethical principles are to be subject to losing their careers and reputations, they should be told what conduct will bring about those results.
>
> Second, proclaiming in law the ethical standards to which ministers and MLAs are required to adhere and adopting measures to promote adherence to them should improve the public perception and increase public confidence.
>
> Third, stating principles and rules in law will increase adherence to them. Legislating morality may not affect the conduct of amoral people. People of ordinary ethical standards, however, respect the law and are likely to take to heart principles and rules which are stated in it; and people of somewhat lower ethical standards are likely to see that it is to their advantage to adhere to it.
>
> Fourth, specific measures designed to minimize conflicts of interests are much more likely to be successful if they are seen as part of a coherent system. A specific example is disclosure of financial interests, which, we think, can better respect privacy interests if the basic purposes of the conflicts of interests system are stated and understood.

When it was introduced in 1993, Alberta's legislation did not include the recommended statement of principles. Another review panel made the same recommendation in 1996, however, stating:

> The ... Act must begin with a *clear* statement of the fundamental principles which it represents. The present Act has no such statement of purpose. The statement of purpose will be a constant reminder to elected officials of the importance of their roles and of their obligations to the citizens of Alberta.[238]

When the Act was amended in 1998, the following preamble was added before the enacting clause:[239]

> WHEREAS the ethical conduct of elected officials is expected in democracies;

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[236] Canada, Office of the Ethics Counsellor, *supra* n. 147, at 1.

[237] Alta. Conflict of Interest Review Panel, *supra* n. 5, at 50.

[238] Alta. Conflicts of Interest Review Panel, *supra* n. 2, at 23.

[239] *Conflicts of Interest Amendment Act, 1998*, S.A. 1998, c. 33, s. 2. The Act was assented to on December 9, 1998, but has not yet been proclaimed in force.

WHEREAS Members of the Legislative Assembly are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence and trust in the integrity of each Member, that maintains the Assembly's dignity and that justifies the respect in which society holds the Assembly and its Members; and

WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality:

Since 1994 Ontario's Act has included the following preamble:[240]

It is desirable to provide greater certainty in the reconciliation of the private interests and public duties of members of the Legislative Assembly, recognizing the following principles:

1. The Assembly as a whole can represent the people of Ontario most effectively if its members have experience and knowledge in relation to many aspects of life in Ontario and if they can continue to be active in their own communities, whether in business, in the practice of a profession or otherwise.

2. Members' duty to represent their constituents includes broadly representing their constituents' interests in the Assembly and to the Government of Ontario.

3. Members are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence in the integrity of each member, maintains the Assembly's dignity and justifies the respect in which society holds the Assembly and its members.

4. Members are expected to act with integrity and impartiality that will bear the closest scrutiny.

The Yukon *Conflict of Interest (Members and Ministers) Act* has included a Preamble since 1999 that is broadly similar to Alberta's.[241] The Northwest Territories[242] and Nunavut[243] require members to:

perform his or her duties of office and arrange his or her private affairs in such a manner as to maintain public confidence and trust in the integrity, objectivity and impartiality of the member;

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[240] *Members' Integrity Act, 1994*, S.O. 1994, c. 38.

[241] *Conflict of Interest (Members and Ministers) Act*, S.Y. 1995, c. 5, as am. by the *Conflict of Interest (Members and Ministers), Public Servants and Cabinet and Caucus Employees Act*, S.Y. 1999, c. 12, s. 2.

[242] *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 75(a).

[243] *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, s. 67(a).

This latter provision was strongly endorsed in a recent review of the Northwest Territories' legislation as imposing a high standard of ethical conduct on members.[244]

Not everyone is enthusiastic about the inclusion of a statement of ethical principles in conflict of interest legislation. A committee of the British Columbia Legislature recently considered the idea in its review of that province's conflict of interest legislation, and rejected it. The committee's report stated, among other things:

> It is the view of the Committee that, as a general rule, legislation which purports to regulate or prohibit certain types of conduct must be sufficiently clear so as to permit those who are being regulated to know with certainty what they are and are not allowed to do. The incorporation of a general integrity clause into the *Members' Conflict of Interest Act* would not satisfy this basic requirement of good legislation. While there is undoubtedly broad agreement about the core elements of ethical behaviour, there is often vigorous disagreement about the application of principles of ethics to particular cases. Such disagreements are perfectly appropriate in the political realm. But it is unwise to create legally enforceable sanctions for behaviour the propriety of which is a matter of disagreement.[245]

With all due respect to the British Columbia committee, the Commission is of the opinion that a preamble of the type found in Alberta, Ontario, the Yukon, the Northwest Territories, and Nunavut is desirable. Such a preamble is sufficiently helpful, in terms of establishing a framework for the legislation itself, that any concerns about its clarity are outweighed. Furthermore, as a preamble, the clause does not in fact create or impose particular obligations, but rather serves as a set of guiding principles to assist with the interpretation of the legislation.

If the purpose of the Act is, at least in part, to reaffirm or re-establish public faith in the integrity and ethical behaviour of elected officials, insertion of a preamble along the lines of Alberta's cannot but go some way toward accomplishing that aim. Objections that it is legalistic, or overly vague, fail to appreciate that a preamble is, at the end of the day, merely an expression of intent on the part of legislators. While it may well "raise the bar" in terms of ethical expectations, it does not place any elected official whose actions are ethically sound at any risk of censure. The Commissioner, and members of the Assembly, will merely be guided in their interpretation of the specific provisions in the Act by the guiding principles in the preamble.

RECOMMENDATION 45

The Act should include a preamble in the following terms:

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[244]N.W.T. *Report of the Conflict of Interest Review Panel*, *supra* n. 46, at 18-19.

[245]British Columbia, Legislative Assembly, Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills, *Proceedings* (6 December 1999) at 26-27.

WHEREAS the ethical conduct of elected officials is expected in democracies;

WHEREAS Members of the Legislative Assembly are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence and trust in the integrity of each Member, that maintains the Assembly's dignity and that justifies the respect in which society holds the Assembly and its Members; and

WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality.

1. Parliamentary Convention

In addition to the preamble regarding ethical principles, in Ontario[246] and Prince Edward Island[247] the Commissioner enforces, and can provide advice and recommendations with respect to, parliamentary convention as well as the provisions of the Act. This includes prohibitions, for example, such as the prohibition against members of the executive appearing as advocates or supporters before any provincial agency, board, or commission under their jurisdiction.[248]

Incorporating such provisions in the Act would substantially expand the scope of the Commissioner's responsibilities, and authority. Neither Ontario nor Prince Edward Island define what is meant by "parliamentary convention," leaving it entirely to the Commissioner's good sense and discretion – limited, presumably, by existing common law and other non-statutory definitions.

While there may be sound reasons for giving the Commissioner the authority to enforce Parliamentary convention in this manner, the Commission is not persuaded that such a step is either necessary or desirable at this time. Before such a step is undertaken, the Commission would recommend a review and delineation of the precise scope of the parliamentary convention that the Commissioner would be expected to enforce.

I. MISCELLANEOUS AMENDMENTS

In addition to the substantial recommendations outlined above, the Commission has identified a number of potential changes which, while of somewhat less significance, will nonetheless improve the legislation's effectiveness.

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[246]See for example *Members' Integrity Act, 1994*, S.O. 1994, c. 38, ss. 28, 30, and 34.

[247]See for example *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, ss. 7, 28, and 32.

[248]Evans, *supra* n. 43, at 25.

1. Provisions of *The Legislative Assembly Act*

The Legislative Assembly Act disqualifies certain individuals from running for election as, or sitting as, members:

> Except as hereinafter specially provided, no person accepting or holding any office, commission or employment, or performing any duty, in respect of which any salary, fee, payment, allowance, or emolument, is payable from the Crown in right of the province, is eligible to be nominated for, or elected as a member of, the Legislative Assembly; nor shall he sit or vote in the assembly during the time he holds the office, commission, or employment, or he is performing the duty, or the salary, payment, allowance, or emolument, is payable to him.[249]

In a number of other provinces, this type of provision – to the extent that it prohibits members from contracting with government – has been appropriately included in the conflict of interest legislation,[250] as being in effect a prohibition of a particular kind of conflict of interest. The provision prohibits a member from being a recipient of public moneys[251] while at the same time purporting to represent the public interest as a member of the Legislative Assembly.

The Commission considers it appropriate that provisions governing contractual relationships between members and the Government of Manitoba should be part of the province's conflict of interest legislation, rather than *The Legislative Assembly Act*.

A committee of the British Columbia Legislative Assembly recently recommended a similar amendment to that province's legislation, on the basis that "such an amendment would serve to consolidate the conflict-of-interest provisions applicable to Members of the Legislative Assembly".[252] Furthermore, this would enable the Commissioner to grant approval to a member's contractual arrangements where those arrangements would be unlikely to affect the member's performance of his or her duties; this is provided for in Saskatchewan, Ontario, New Brunswick, and Prince Edward Island.[253]

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[249] *The Legislative Assembly Act*, C.C.S.M. c. L110, s. 12; various exceptions to the prohibition are set out in ss. 13-17.

[250] See, for example, *Conflicts of Interest Act*, S.A. 1991, c. C-22.1, ss. 8 & 9; *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 15; *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 7; *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, ss. 9-11; *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 14; and *House of Assembly Act*, R.S.N. 1990, c. H-10, s. 32.

[251] Other than the compensation provided for members pursuant to the Act.

[252] B.C. Legislative Assembly, *Proceedings*, *supra* n. 245, at 25.

[253] *The Members' Conflict of Interest Act*, S.S. 1993, c. M-11.11, s. 16; *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 7(4); *Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 9(4); and *Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 14(4).

RECOMMENDATION 46

Sections 12 through 17 of* The Legislative Assembly Act, *to the extent that they regulate contractual relationships between members of the Legislative Assembly and the Government of Manitoba, should be incorporated into the Act.

RECOMMENDATION 47

The Commissioner should be authorized to approve arrangements that would otherwise be prohibited by the sections referred to in Recommendation 46 if he or she is satisfied that those arrangements are unlikely to affect the member's performance of his or her duties.

2. Document Retention

There are at present no provisions in the Act regarding the destruction of records – specifically, the disclosure forms filed annually by members. In fact, all disclosure forms completed by members and former members remain in the possession of the Clerk's office.[254] As is the case with any enactment requiring the filing of records, it would be preferable to clarify where and for how long such documents must be retained.

Document retention requirements in other jurisdictions vary widely. For example, Ontario[255] and Prince Edward Island[256] require that all records must be destroyed within 12 months of the 10 year anniversary of their creation, while New Brunswick,[257] Newfoundland,[258] and the proposed federal code[259] require that records be destroyed 12 months after the member in question has ceased to be a member, and the Northwest Territories[260] and Nunavut[261] provide for destruction of records six years after the member ceases to be a member. A recent report in British Columbia

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[254]E-mail from P. Chaychuck, Clerk of the Legislative Assembly, Province of Mantioba, to Jonathan Penner (11 June 2000).

[255]*Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 22(1).

[256]*Conflict of Interest Act*, S.P.E.I. 1999, c. 22, s. 27(1).

[257]*Members' Conflict of Interest Act*, S.N.B. 1999, c. M-7.01, s. 21(1).

[258]*House of Assembly Act*, R.S.N. 1990, c. H-10, s. 41.

[259]Canada, Parliament, *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons, supra* n. 32, at 13.

[260]*Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 90.

[261]*Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, s. 78.1.

recommended destruction seven years after the end of the Commissioner's term of office.[262]

Alberta has provided for greater flexibility by allowing the Standing Committee on Legislative Offices to make orders respecting the management of records in the custody of the Commissioner, on the Commissioner's recommendation.[263]

While there may not be any particularly appropriate length of time for which to retain documents, clearly they should be preserved for as long as they might reasonably be required for purposes of a proceeding under the Act, and destroyed promptly once their retention is no longer reasonably necessary.

Given these guidelines, and given the disparate approaches in other Canadian jurisdictions, the Commission is persuaded that it should be incumbent on the Commissioner to investigate, and recommend with respect to, the appropriate period of time for which records in his or her possession ought to be retained.

RECOMMENDATION 48

The Commissioner should be authorized to recommend, for approval by the appropriate committee of the Legislative Assembly, guidelines relating to the retention and destruction of records in his or her possession.

It should also be noted that all legislation in this area uniformly provides that regardless of the prescribed retention period, documents must not be destroyed if the Commissioner is aware of proceedings under the Act, or charges laid under the *Criminal Code*, to which the documents may be relevant.

RECOMMENDATION 49

The Commissioner should be prohibited from destroying documents that relate to any investigation under the Act, or to any charges laid under the* Criminal Code, *of which he or she is aware.

3. Automatic Review

It has now been twelve years since the Act was last reviewed, and, as will be clear from the number and scope of recommendations in this Report, much has changed in the interim. Such massive overhauls of the Act could be avoided if the Act were reviewed regularly. A comprehensive review of the legislation by a legislative committee every five years is now

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[262]B.C. Legislative Assembly, *Proceedings*, *supra* n. 245, at 30.

[263]*Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 44.1.

mandatory in Alberta,[264] and has been recommended in British Columbia.[265] The reasoning of the Alberta review panel in 1996 was lucid:

> A mandatory review acknowledges the importance of the Act and recognizes the need to assess it regularly in light of changing public expectations, alterations to the role of government, and changes in the responsibilities of Members.[266]

The Commission concurs with these sentiments.

RECOMMENDATION 50

The Act should provide for its mandatory review every five years by the appropriate committee of the Legislative Assembly.

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[264]*Conflicts of Interest Act*, S.A. 1991, c. C-22.1, s. 44.2, as am. by *Conflicts of Interest Amendment Act, 1998*, S.A. 1998, c. 33, s. 18, which has not yet been proclaimed in force.

[265]B.C. Legislative Assembly, *Proceedings*, *supra* n. 245, at 26.

[266]Alta. Conflicts of Interest Review Panel, *supra* n. 2, at 40-41.

CHAPTER 5

LIST OF RECOMMENDATIONS

The following is a list of the recommendations contained in this Report:

1. *The Legislative Assembly and Executive Council Conflict of Interest Act* should be repealed and replaced with a Conflict of Interest Act in a form similar to that attached hereto as Appendix A. (p. 22)

2. The position of Conflict of Interest Commissioner should be created, with responsibility for administering, interpreting, and enforcing the Act. (pp. 26-27)

3. The Conflict of Interest Commissioner should be an Officer of the Legislative Assembly. (p. 28)

4. The Conflict of Interest Commissioner should be appointed by a two-thirds majority of the Legislative Assembly, on the unanimous recommendation of the Standing Committee on Privileges and Elections. (p. 29)

5. The Conflict of Interest Commissioner should be appointed for a six year term and be eligible for re-appointment on the expiry of his or her term of office. (p. 30)

6. The Conflict of Interest Commissioner should have four primary roles:

   (a) supervising the disclosure requirements under the Act;
   (b) providing advice and guidance to members and Ministers;
   (c) educating members, Ministers, and the public regarding conflict of interest rules; and
   (d) investigating alleged breaches of the Act and recommending appropriate dispositions to the Legislative Assembly. (p. 31)

7. The disclosure forms required by the Act should be filed with the Commissioner, rather than with the Clerk of the Legislative Assembly. (p. 32)

8. The Conflict of Interest Commissioner should review the private disclosure forms filed by members, and prepare public disclosure forms based on those forms. Before preparing the public disclosure forms, however, the Commissioner should meet with each member and his or her spouse, if available. (p. 32)

9. The Conflict of Interest Commissioner should be required to respond to requests from members and former members for advice and guidance as to their responsibilities under the Act. As long as the member or former member provides all material facts to the Commissioner, and complies with any recommendations made by the Commissioner, the member or former member should be rendered immune from any subsequent proceedings under the Act with respect to the transaction in question. (p. 35)

10. The Conflict of Interest Commissioner should be authorized to provide recommendations to members or former members as a class, or to a sub-class of members or former members. Compliance with any such recommendations should render an eligible member or former member immune from subsequent proceedings under the Act with respect to their actions. (p. 35)

11. The Conflict of Interest Commissioner should be required to promote awareness and understanding by members, prospective members, and the general public of ethics in government in general, and conflicts of interest in particular, in such manner as the Commissioner deems appropriate.(p. 37)

12. The Act should permit any member of the public, any member of the Legislative Assembly, or the Legislative Assembly (by resolution) to request that the Commissioner investigate an allegation that the Act has been breached by a member. The Act should also permit the Executive Council to request the Commissioner to investigate an allegation of a breach of the Act by a Minister. (p. 39)

13. The Commissioner should have the discretion to refuse a request to investigate where:

    (a) the request is made anonymously;
    (b) he or she is satisfied that the request is frivolous, vexatious, or not made in good faith; or
    (c) he or she is satisfied that there are insufficient grounds for an investigation. (p. 40)

14. The Commissioner should have the discretion to investigate a supposed breach of the Act by a member or Minister on his or her own initiative where he or she considers it in the public interest to do so. (p. 40)

15. When conducting an investigation under the Act, the Commissioner should have the powers and privileges of a commissioner under Part V of *The Manitoba Evidence Act*. (p. 41)

16. The Commissioner should be able to recommend to the Legislative Assembly any or all of the following sanctions when he or she finds a breach of the Act by a member:

    (a) a reprimand;

(b) a fine;
(c) an order of restitution;
(d) suspension of the member; and/or
(e) a declaration that the member's seat is vacant. (p. 44)

17. The Commissioner should be able to recommend to the Legislative Assembly that a member who has breached the Act not be penalized if the member rectifies the breach in a manner specified by the Commissioner. (p. 44)

18. If the Commissioner is satisfied that a member's breach of the Act was trivial, inadvertent, or in good faith, the Commissioner should be permitted to recommend to the Legislative Assembly that no penalty be imposed. (p. 44)

19. When the Commissioner finds that a member has breached the Act, the Legislative Assembly should have the option of accepting the recommendations of the Commissioner in whole or in part, imposing a different penalty or penalties, or imposing no penalty at all. (p. 44)

20. Section 47(b) of *The Legislative Assembly Act* should be repealed. (p. 45)

21. The Act should provide that the Legislative Assembly's decision regarding imposition of any penalty under the Act is final and conclusive and is not subject to review or appeal in any court. (p. 46)

22. The Commissioner should be required to report annually to the Legislative Assembly on the activities of his or her office. (p. 46)

23. The Act should provide that no action lies against the Commissioner or any employee in his or her office for any act done in good faith under the Act. (p. 47)

24. The Act should provide that no action lies against any person providing information, or giving evidence, to the Commissioner in the course of an investigation under the Act, so long as such acts are done in good faith. (p. 47)

25. The Act should define conflicts of interest with reference to the term "private interest". (p. 52)

26. The Act should define "private interest" to include any pecuniary or non-pecuniary interest that directly or indirectly confers a real and tangible personal benefit on a person, regardless of whether the benefit is conferred before or after the exercise of an official power or function. (p. 54)

27. The Act should prohibit apparent, and not only actual, conflicts of interest. (p. 56)

28. The Act should provide the following exemption to the definition of "private interest":

Interests arising from the exercise of an official power or the performance of an official duty or function that

(a) apply to the general public,
(b) affect a member as one of a broad class of electors,
(c) concern the remuneration and benefits of a member or an officer or employee of the Legislative Assembly, or
(d) are so insignificant that they are unlikely to affect the member. (pp. 58-59)

29. The Act should define conflicts of interest by reference to a member's "family," rather than "dependants," defined as follows:

"family", when used with reference to a person, means,

(a) his or her domestic partner and minor children, and
(b) any other adult who is related to the person or his or her spouse, shares a residence with the person and is primarily dependent on the person or spouse for financial support.

"Domestic partner" should be defined in such a way as to include a person who resides or has resided with another person in a spousal or intimate relationship. (p. 61)

30. The Act should provide that, in the absence of evidence to the contrary, members are presumed not to have knowledge of information that a family member is under a professional obligation not to disclose to them. (p. 62)

31. The Act should prohibit the acceptance, by members or their family members, of fees, gifts, or other benefits connected directly or indirectly with the performance of members' duties of office. Acceptance of compensation authorized by law, or gifts received as an incident of the protocol, customs, or social obligations that normally accompany the responsibilities of office should not be prohibited. Gifts falling into this category, however, should be required to be disclosed if they exceed $250 in value individually or cumulatively in a 12 month period from a single source. (p. 64)

32. The Government should address the problem of conflicts of interest in the public service in a separate code of conduct rather than in *The Conflict of Interest Act*. Pending the development of such a code of conduct, however, the existing provisions dealing with senior public servants should be continued in the new Act. (p. 67)

33. The Act should prohibit former Ministers, for 12 months after leaving office, from accepting a contract or benefit from any person who received a contract or benefit from a department of which the former Minister was the Minister, unless the conditions on which

the contract or benefit was awarded, approved, or granted are the same for all persons similarly entitled. (p. 68)

34. The Act should prohibit former Ministers from ever making representations to the government in relation to transactions or negotiations to which the government is a party and in which they were directly involved while a Minister, if such a representation would result in the conferring of a benefit that is not for general application. (p. 69)

35. The Act should prohibit former Ministers, for 12 months after leaving office, from accepting a contract or benefit from any person who received a contract or benefit from a department of which the former Minister was the Minister. (p. 70)

36. The Act should require members to file a general list of "disclosable" assets and interests that will

    (a) identify the assets and liabilities of the member and his or her family, and state their value;
    (b) state any income the member and his or her family have received during the preceding 12 months or are entitled to receive during the next 12 months, and indicate the source of the income;
    (c) state all benefits the member, his or her family, and any private company in which any of them has an interest, have received during the preceding 12 months or are entitled to receive during the next 12 months as a result of a contract with the Government of Manitoba, and describe the subject-matter and nature of the contract;
    (d) if the private disclosure statement mentions a private company,
        (i) include any information about the company's activities and sources of income that the member is able to obtain by making reasonable inquiries, and
        (ii) state the names of any other companies that are its affiliates, as determined under subsections 1(2) to (7) of *The Securities Act*;
    (e) list all corporations and other organizations in which the member is an officer or director or has a similar position; and
    (f) include any other information that the Commissioner requires. (pp. 73-74)

37. The Act should require members to disclose the value of their interests on a private disclosure statement. The private disclosure statement should be screened by the Commissioner to remove any reference to the values in the process of creating a public disclosure statement. (p. 76)

38. The Act should require members to disclose to the Commissioner all the income they and their family members have received in the previous twelve months, or expect to receive in the upcoming twelve months. (p. 77)

39. Public disclosure statements filed by members should be made more accessible to the public. Members of the public should be furnished with photocopies of disclosure statements on request, and consideration should be given to making the statements available on the Internet. (p. 79)

40. Disclosure forms should be reviewed and updated on a regular basis. Members should also be given the option of filing a form indicating that there have been no changes to their previously disclosed interests. (p. 79)

41. Ministers should be prohibited from engaging in any of the following activities if and to the extent that the activity is likely to create a conflict between their private interests and their public duties:

    (a) engaging in employment or the practice of a profession;
    (b) managing the business of a corporation;
    (c) carrying on business through a sole proprietorship or partnership;
    (d) holding an office or directorship; or
    (e) holding or trading in stocks, securities, futures, or commodities. (p. 81)

42. The Commissioner should be empowered to permit a Minister to engage in an activity that would otherwise be prohibited, on conditions if necessary, if the Commissioner is satisfied that the activity will not create a conflict of interest between the Minister's private interests and his or her public duties. (p. 81)

43. Ministers should be permitted to entrust securities, stocks, futures, or commodities to a trustee, if the following conditions are met:

    (a) the trustee and the terms of the trust are approved by the Commissioner;
    (b) the trustee has no relationship with the Minister that would affect or appear to affect the discharge of the trustee's duties; and
    (c) the terms of the trust preclude the Minister from having any knowledge of the specific investments in the trust. (p. 83)

44. Ministers should be entitled to reimbursement of reasonable fees and expenses actually paid for the cost of establishing a blind trust in accordance with the Act. (p. 84)

45. The Act should include a preamble in the following terms:

    WHEREAS the ethical conduct of elected officials is expected in democracies;

    WHEREAS Members of the Legislative Assembly are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence and trust in the integrity of each Member, that maintains the

Assembly's dignity and that justifies the respect in which society holds the Assembly and its Members; and

WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality. (pp. 87-88)

46. Sections 12 through 17 of *The Legislative Assembly Act*, to the extent that they regulate contractual relationships between members of the Legislative Assembly and the Government of Manitoba, should be incorporated into the Act. (p. 90)

47. The Commissioner should be authorized to approve arrangements that would otherwise be prohibited by the sections referred to in Recommendation 46 if he or she is satisfied that those arrangements are unlikely to affect the member's performance of his or her duties. (p. 90)

48. The Commissioner should be authorized to recommend, for approval by the appropriate committee of the Legislative Assembly, guidelines relating to the retention and destruction of records in his or her possession. (p. 91)

49. The Commissioner should be prohibited from destroying documents that relate to any investigation under the Act, or to any charges laid under the *Criminal Code*, of which he or she is aware. (p. 91)

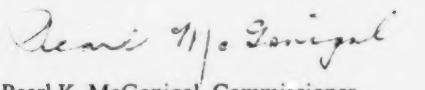
50. The Act should provide for its mandatory review every five years by the appropriate committee of the Legislative Assembly. (p. 92)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 20th day of December 2000.

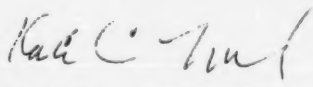
Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner



Pearl K. McGonigal, Commissioner



Kathleen C. Murphy, Commissioner

APPENDIX A

DRAFT CONFLICT OF INTEREST ACT

Preamble

WHEREAS the ethical conduct of elected officials is expected in democracies;

WHEREAS Members of the Legislative Assembly are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence and trust in the integrity of each Member, that maintains the Assembly's dignity and that justifies the respect in which society holds the Assembly and its Members; and

WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality,

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Manitoba, enacts as follows:

Definitions

1 In this Act,

"children" includes persons whom a member of the Assembly has demonstrated a settled intention to treat as children of his or her family, except under an arrangement where the children are placed for valuable consideration in a foster home by a person having lawful custody;

"Commissioner" and "Conflict of Interest Commissioner" mean the person appointed as Conflict of Interest Commissioner under section 21;

"common law spouse" means a person who resides or has resided with another person in a spousal or intimate relationship;

"Crown agency" means any board, commission, association, or other body, whether incorporated or unincorporated, all the members of which, or of the board of management or board of directors of which,

(a) are appointed by an Act of the Legislature or by order of the Lieutenant Governor in Council, or

(b) if not so appointed, in the discharge of their duties are public officers or servants of the Crown, or for the proper discharge of their duties are directly or indirectly

responsible to the Crown,

or any corporation the election of the board of directors of which is controlled by the Crown, directly or indirectly, through ownership of the shares of the capital stock thereof by the Crown or by a board, commission, association, or other body that is a Crown agency within the meaning of this definition;

"domestic partner" means a member's spouse or common law spouse, but does not include a spouse or common law spouse who is separated and living apart from a member and who

(a) has entered into a written agreement under which they have agreed to live apart, or

(b) is subject to an order of the court recognizing the separation;

"family", when used with reference to a person, means,

(a) his or her domestic partner and minor children, and

(b) any other adult who is related to the person or his or her domestic partner, shares a residence with the person, and is primarily dependent on the person or domestic partner for financial support;

"private company" has the same meaning as in the Securities Act;

"private interest" includes any pecuniary or non-pecuniary interest that directly or indirectly confers a real and tangible personal benefit on a person, regardless of whether the benefit is conferred before or after a decision, but does not include an interest in a decision,

(a) that is of general application,

(b) that affects a member of the Assembly as one of a broad class of persons,

(c) that concerns the remuneration or benefits of a member or of an officer or employee of the Assembly, or

(d) where the interest is so insignificant in its nature that a decision affecting the interest cannot reasonably be regarded as likely to influence the member;

"Speaker" means the Speaker of the Assembly.

PROVISIONS APPLYING TO ALL MEMBERS OF THE ASSEMBLY

Conflict of interest

2 No member of the Assembly shall make a decision, participate in making a decision, or exercise an official power in the execution of his or her office if

(a) the member knows that in doing so there is an opportunity to further the member's private interest or improperly to further another person's private interest, or

(b) a reasonably well informed person could reasonably perceive that the member's ability to do so must have been affected by his or her private interest.

Insider information

3(1) No member of the Assembly shall use information that is

(a) obtained in his or her capacity as a member, and

(b) not available to the general public

to further or seek to further the member's private interest or improperly to further or seek to further another person's private interest.

3(2) No member shall communicate information described in subsection (1) to another person if the member knows or reasonably should know that the information may be used for a purpose described in that subsection.

Influence

4 No member of the Assembly shall use his or her office to seek to influence a decision made or to be made by another person so as to further the member's private interest or improperly to further another person's private interest.

Activities on behalf of constituents

5 This Act does not prohibit the activities in which members of the Assembly normally engage on behalf of constituents.

Gifts

6(1) No member of the Assembly, or person who belongs to a member's family, shall accept a fee, gift, or personal benefit that is connected directly or indirectly with the performance of the member's duties of office.

6(2) Subsection (1) does not apply to,

(a) compensation authorized by law;

(b) a gift or personal benefit that is received as an incident of the protocol, customs, or social obligations that normally accompany the responsibilities of office.

6(3) Within 30 days of receipt by a member or a person who belongs to a member's family of a gift or personal benefit referred to in clause (2)(b) that exceeds $250 in value, the member shall file with the Commissioner a disclosure statement in the form provided by the Commissioner, indicating the nature of the gift or benefit, its source, and the circumstances under which it was given and accepted.

6(4) Subsection (3) also applies to gifts and personal benefits if the total value of what is received from one source in any 12 month period exceeds $250.

Government contracts with members

7(1) No member of the Assembly shall knowingly be a party to a contract with the Government of Manitoba under which the member receives a benefit.

7(2) Despite subsection (1), a member of the Assembly may accept from the Government of Manitoba any indemnity, allowance, salary, and reimbursement for expenses authorized under the Legislative Assembly Act or the Executive Government Organization Act, and reimbursement approved by the Provincial Auditor for reasonable expenses incurred by the member in transacting public business pursuant to a resolution of the Assembly, or have any or all of those expenses paid on his or her behalf by the Government of Manitoba; and nothing in this Act disqualifies the member from sitting and voting in the Assembly or subjects him or her to penalty for accepting the indemnity, allowance, salary or reimbursement or because those expenses have been paid on his or her behalf; but nothing in this section authorizes a member to accept appointment to a statutory board, commission, or body the remuneration in respect of which is paid from the Consolidated Fund or to accept remuneration or reimbursement from the Government of Manitoba in respect of any duties performed as a member of or on the direction of any statutory board, commission, or body.

7(3) Subsection (1) does not prohibit a member from receiving benefits under Part 3 of the Legislative Assembly Act, the Civil Service Superannuation Act, the Teachers' Pensions Act or any other Act that provides for retirement benefits funded wholly or partly by the Government of Manitoba.

7(4) No member shall have an interest in a partnership or in a private company that is a party to a contract with the Government of Manitoba under which the partnership or company receives a benefit.

7(5) Subsections (1) and (4) do not apply:

(a) to a contract that existed before the member's election to the Assembly, but they do apply to its renewal or extension; or

(b) if the Commissioner has provided the member with his or her opinion in writing that the member's interest is unlikely to affect the member's performance of his or her duties.

7(6) Subsection (4) does not apply until the first anniversary of the acquisition if the interest in the partnership or private company was acquired by inheritance.

Procedure on conflict of interest

8(1) A member of the Assembly who has reasonable grounds to believe that he or she has a conflict of interest, as described in section 2, in a matter that is before the Assembly or the Executive Council, or a committee of either of them, shall, if present at a meeting considering the matter,

(a) disclose the general nature of the conflict of interest;

(b) withdraw from the meeting without voting or participating in consideration of the matter; and

(c) refrain at all times from attempting to influence the matter.

8(2) Where a member has complied with subsection (1), the clerk of the meeting shall record

(a) the disclosure;

(b) the general nature of the conflict of interest disclosed; and

(c) the withdrawal of the member from the meeting;

and the clerk of the meeting shall subsequently file the recorded information with the Commissioner.

Rights preserved

9 Nothing in this Act prohibits a member of the Assembly who is not a member of the Executive Council from,

(a) engaging in employment or in the practice of a profession;

(b) receiving fees for providing professional services under the Legal Aid Services Society of Manitoba Act;

(c) engaging in the management of a business carried on by a corporation;

(d) carrying on a business through a partnership or sole proprietorship;

(e) holding or trading in securities, stocks, futures and commodities;

(f) holding shares or an interest in any corporation, partnership, syndicate, cooperative or similar commercial enterprise;

(g) being a director or partner or holding an office, other than an office that a member may not hold under another Act.

Knowledge not to be imputed

10 In the absence of evidence to the contrary, members shall be presumed not to have knowledge of information which a family member is under a professional obligation not to disclose to them.

PROVISIONS APPLYING TO MEMBERS AND FORMER MEMBERS OF THE EXECUTIVE COUNCIL

Outside activities

11(1) A member of the Executive Council shall not,

(a) engage in employment or the practice of a profession;

(b) engage in the management of a business carried on by a corporation;

(c) carry on business through a partnership or sole proprietorship; or

(d) hold an office or directorship, unless holding the office or directorship is one of the member's duties as a member of the Executive Council, or the office or directorship is in a social club, religious organization, or political party

if any of these activities are likely to conflict, or to appear to conflict, with the member's public duties.

11(2) For the purposes of this section, the management of routine personal financial interests does not constitute carrying on a business.

Investments

12(1) A member of the Executive Council shall not hold or trade in securities, stocks, futures or commodities.

12(2) A member may comply with subsection (1) by entrusting the assets to one or more trustees on the following terms:

(a) The provisions of the trust shall be approved by the Commissioner.

(b) The trustees shall be persons who are at arm's length with the member and approved by the Commissioner.

(c) The trustees shall not consult with the member with respect to managing the trust property, but may consult with the Commissioner.

(d) At the end of each calendar year and at one or more intervals during the year, the trustees shall give the member a written report stating the value, but not the nature, of the assets in the trust. The year-end report shall also state the trust's net income for the preceding year and the trustees' fees, if any.

(e) The trustees shall also give the member sufficient information to permit him or her to submit returns as required by the Income Tax Act (Canada) and shall give the same information to Revenue Canada.

(f) The trustee shall give the Commissioner copies of all information and reports given to the member.

(g) The trust shall provide that the member may, at any time, instruct the trustees to liquidate all or part of the trust and pay over the proceeds to the member.

12(3) A member is entitled to be reimbursed from the Consolidated Revenue Fund for reasonable fees and disbursements actually paid for the establishment and administration of a trust under subsection (2), as approved by the Commissioner, but is responsible for any income tax liabilities that may result from the reimbursement.

Approved exceptions

13 A member of the Executive Council may engage in an activity prohibited by clauses 11(1)(b), (c), or (d) or subsection 12(1) if the following conditions are met:

(a) the member has disclosed all material facts to the Commissioner;

(b) the Commissioner is satisfied that the activity, if carried on in the specified manner, will not create a conflict between the member's private interest and public duty;

(c) the Commissioner has given the member his or her approval and has specified the manner in which the activity may be carried out; and

(d) the member carries out the activity in the specified manner.

Time for compliance

14 A person who becomes a member of the Executive Council shall comply with subsections 11(1) and 12(1) or (2), or obtain the Commissioner's approval under section 13, within 60 days after the appointment.

Procedure on conflict of interest

15 Where, during the exercise of any official power or the performance of any official duty or function, a member of the Executive Council has reasonable grounds to believe that he or she has a conflict of interest as described in section 2, the member shall:

(a) delegate the power, duty, or function to the Executive Council or a committee thereof;

(b) refrain at all times from attempting to influence the matter; and

(c) at any subsequent meeting of the Executive Council or a committee thereof which considers the matter, disclose the general nature of the conflict of interest and withdraw from the meeting without voting or participating in the discussion.

Restrictions applicable to Executive Council

16(1) The Executive Council, its members, and employees of a department shall not knowingly,

(a) award or approve a contract with, or grant a benefit to, a former member of the Executive Council until 12 months have passed after the date he or she ceased to hold office;

(b) award or approve a contract with, or grant a benefit to, a former member of the Executive Council who has, during the 12 months after the date he or she ceased to hold office, made representations to the Government of Manitoba in respect of the contract or benefit;

(c) award or approve a contract with, or grant a benefit to, a person on whose behalf a former member of the Executive Council has, during the 12 months after the date he or she ceased to hold office, made representations to the Government of Manitoba in respect of the contract or benefit.

16(2) Clauses (1) (a) and (b) do not apply to contracts or benefits in respect of further duties in the service of the Crown.

16(3) Subsection (1) does not apply if the conditions on which the contract or benefit is awarded, approved, or granted are the same for all persons similarly entitled.

Restrictions applicable to former members

17(1) A former member of the Executive Council shall not knowingly, during the 12 months after the date he or she ceased to hold office,

(a) accept a contract or benefit that is awarded, approved, or granted by the Executive Council, a member of the Executive Council or an employee of a department;

(b) make representations to the Government of Manitoba on his or her own behalf or on another person's behalf with respect to such a contract or benefit;

(c) accept a contract or benefit from any person who received a contract or benefit from a department of which the former member was the minister.

17(2) Subsection (1) does not apply to contracts or benefits in respect of further duties in the service of the Crown.

17(3) Subsection (1) does not apply if the conditions on which the contract or benefit is awarded, approved, or granted are the same for all persons similarly entitled.

17(4) A former member of the Executive Council shall not make representations to the Government of Manitoba in relation to a transaction or negotiation to which the Government is a party and in which he or she was previously involved as a member of the Executive Council, if the representation could result in the conferring of a benefit not of general application.

17(5) Subject to subsections 28(5) and 29(2), a person who contravenes subsection (1) or (4) is guilty of an offence and liable, on conviction, to a fine of not more than $50,000.

Legislative assistants

18 Sections 11 to 17 do not apply to legislative assistants or to former legislative assistants, as the case may be.

DISCLOSURE

Private disclosure statement

19(1) Every member of the Assembly shall file with the Commissioner a private disclosure statement, in the form provided by the Commissioner,

(a) within 60 days of being elected; and

(b) thereafter, once in every calendar year on the date established by the Commissioner.

19(2) The private disclosure statement shall,

(a) identify the assets and liabilities of the member and his or her family, and state their value;

(b) state any income the member and his or her family have received during the preceding 12 months or are entitled to receive during the next 12 months, and indicate the source of the income;

(c) state all benefits the member, his or her family, and any private company in which any of them has an interest, have received during the preceding 12 months or are entitled to receive during the next 12 months as a result of a contract with the Government of Manitoba, and describe the subject-matter and nature of the contract;

(d) if the private disclosure statement mentions a private company,

(i) include any information about the company's activities and sources of income that the member is able to obtain by making reasonable inquiries, and

(ii) state the names of any other companies that are its affiliates, as determined under subsections 1(2) to (7) of the Securities Act;

(e) list all corporations and other organizations in which the member is an officer or

director or has a similar position; and

(f) include any other information that the Commissioner requires.

19(3) If, at the time that a member is required to file a private disclosure statement, there have been no material changes to the information disclosed on the last prior statement filed by the member, the member may file a statement to that effect with the Commissioner, in the form provided by the Commissioner.

19(4) After filing a private disclosure statement under subsection (1), or a statement of no material change under subsection (3), the member, and the member's domestic partner if available, shall meet with the Commissioner to ensure that adequate disclosure has been made and to obtain advice on the obligations of the member and his family under this Act.

19(5) A member shall file a statement of material change with the Commissioner, in the form provided by the Commissioner, within 30 days after

(a) a change in the income, assets or liabilities of the member or his or her family, or

(b) an event that causes a person to become or to cease to be a member of the member's family,

if the change or event would reasonably be expected to have a material effect on the information previously disclosed.

Public disclosure statement

20(1) After the meeting referred to in subsection 19(4), the Commissioner shall prepare a public disclosure statement on the basis of the information provided by the member.

20(2) The public disclosure statement shall,

(a) state the source and nature, but not the value, of the income, assets and liabilities referred to in subsection 19(2), except those that are described in subsection (4) of this section;

(b) list the names and addresses of all the persons who have an interest in those assets and liabilities;

(c) identify any contracts with the Government of Manitoba referred to in the private disclosure statement, and describe their subject-matter and nature;

(d) list the names of any companies shown in the private disclosure statement; and

(e) contain a statement of any gifts or benefits that have been disclosed to the Commissioner under subsection 6(3).

20(3) In the case of a member of the Executive Council, the public disclosure statement shall also state whether the member has obtained the Commissioner's approval under section 13 for an activity that would otherwise be prohibited and, if the member has done so, shall,

(a) describe the activity; and

(b) in the case of a business activity, list the name and address of each person who has a 10 per cent or greater interest in the business, and describe the person's

relationship to the member.

20(4) The following assets, liabilities and sources of income shall not be shown in the public disclosure statement:

(a) An asset or liability worth less than $2,500.

(b) A source of income that yielded less than $2,500 during the 12 months preceding the relevant date.

(c) Real property that the member or a person who belongs to his or her family uses primarily as a residence or for recreational purposes.

(d) Personal property that the member or a person who belongs to his or her family uses primarily for transportation, household, educational, recreational, social, or aesthetic purposes.

(e) Cash on hand, or on deposit with a financial institution that is lawfully entitled to accept deposits.

(f) Fixed value securities issued or guaranteed by a government or by a government agency.

(g) A registered retirement savings plan that is not self-administered, or a registered home ownership savings plan.

(h) An interest in a pension plan, employee benefit plan, annuity, or life insurance policy.

(i) An investment in an open-ended mutual fund that has broadly based investments not limited to one industry or one sector of the economy.

(j) A guaranteed investment certificate or similar financial instrument.

(k) Any other asset, liability, or source of income that the Commissioner approves as an excluded private interest.

20(5) The Commissioner may withhold information from the public disclosure statement if, in his or her opinion,

(a) the information is not relevant to the purpose of this Act; and

(b) a departure from the general principle of public disclosure is justified.

20(6) The Commissioner shall file the public disclosure statement with the Clerk of the Assembly.

20(7) The Clerk shall make the public disclosure statement available for examination by members of the public, and shall provide a copy of it to any person who pays the fee fixed by the Clerk.

CONFLICT OF INTEREST COMMISSIONER

Commissioner

21(1) There shall be a Conflict of Interest Commissioner who is an officer of the Assembly.

21(2) The Lieutenant Governor in Council shall appoint a person to the office of Commissioner on the address of the Assembly.

21(3) The person appointed shall hold office for a term of six years and may be reappointed for a further term or terms.

21(4) The person appointed continues to hold office after the expiry of the term until reappointed, or until a successor is appointed.

21(5) The person appointed may be removed for cause, before the expiry of the term of office, by the Lieutenant Governor in Council on the address of the Assembly.

21(6) The Lieutenant Governor in Council may appoint an acting Commissioner if,

(a) the office of Commissioner becomes vacant during a session of the Assembly, but the Assembly does not make a recommendation under subsection (2) before the end of the session; or

(b) the office of Commissioner becomes vacant while the Assembly is not sitting.

21(7) The appointment of the acting Commissioner comes to an end when a new Commissioner is appointed under subsection (2).

21(8) If the Commissioner is unable to act because of illness, the Lieutenant Governor in Council may appoint an acting Commissioner, whose appointment comes to an end when the Commissioner is again able to act or when the office becomes vacant.

21(9) The Commissioner shall be paid the remuneration and allowances that are fixed by the Lieutenant Governor in Council.

21(10) The Commissioner is not eligible to be nominated for, be elected as, or sit as a member of the Assembly.

21(11) The employees who are necessary for the performance of the Commissioner's duties shall be members of the staff of the Legislative Assembly Office.

Powers and duties

22 The Commissioner may exercise the powers and shall perform the duties assigned to him or her under this Act and any other Act.

General duties

23(1) The Commissioner shall promote the understanding by members of their obligations under this Act by

(a) personal discussion with members, and in particular when consulting with them about their disclosure statements,

(b) preparing and disseminating written information about the obligations, and

(c) maintaining contact with party caucuses and advising them as to steps they might take.

23(2) The Commissioner shall promote the understanding by persons nominated for election to the Assembly of the obligations of members under this Act in such manner as the Commissioner deems appropriate.

23(3) The Commissioner shall promote general public awareness of the provisions of this Act in such manner as the Commissioner deems appropriate.

23(4) The Commissioner shall ensure that all forms required by this Act are reviewed and updated on a regular basis.

Annual Report

24(1) The Commissioner shall report annually on the affairs of the office to the Speaker, who shall cause the report to be laid before the Assembly.

24(2) The annual report may summarize advice given by the Commissioner, but shall not disclose confidential information or information that could identify a person concerned.

Immunity

25(1) No proceeding shall be commenced against the Commissioner or an employee in his or her office for any act done or omitted in good faith in the execution or intended execution of the Commissioner's or employee's duties under this Act or any other Act.

25(2) No action lies against a person who in good faith provides information or gives evidence, in a proceeding under this Act, to the Commissioner or to a person employed or engaged by the Commissioner.

Testimony

26 Neither the Commissioner nor an employee of his or her office is a competent or compellable witness in a civil proceeding outside the Assembly in connection with anything done under this Act or any other Act.

Extension of time

27(1) A member of the Assembly whom this Act requires to do anything within a specified period of time may give the Commissioner a written request for an extension.

27(2) The Commissioner may, by giving the member a written notice, extend the time by a specified number of days, as the Commissioner considers reasonable and consistent with the public interest.

27(3) The Commissioner may impose on the extension such conditions as he or she considers just.

Opinion and recommendations

28(1) A member or former member of the Assembly may request that the Commissioner give an opinion and recommendations on any matter respecting the member's or former member's obligations under this Act.

28(2) The Commissioner may make such inquiries as he or she considers appropriate and shall provide the member or former member with an opinion and recommendations.

28(3) The Commissioner's opinion and recommendations are confidential, but may be released by the member or former member or with the consent of the member or former member.

28(4) The member's or former member's request, the Commissioner's opinion and recommendations, and the member's or former member's consent, if any, shall be in writing.

28(5) With respect to opinions and recommendations given under this section, no proceeding shall be taken against a member or former member under this Act by reason only of the facts and considerations stated in the opinion and recommendations and the member's or former member's compliance with the recommendations.

General opinion and recommendations

29(1) The Commissioner may give an opinion and recommendations of general application to members or former members or a class of members or former members on matters respecting their obligations under this Act, which may be based on the facts set out in the opinion and recommendations or on any other considerations the Commissioner considers appropriate.

29(2) With respect to opinions and recommendations given under subsection (1), no proceeding shall be taken against a member or former member under this Act by reason only of the facts and considerations stated in the opinion and recommendations and the member's or former member's compliance with the recommendations.

Confidentiality

30(1) Information disclosed to the Commissioner under this Act is confidential and shall not be disclosed to any person, except,

(a) by the member, or with his or her consent;
(b) in a criminal proceeding, as required by law; or
(c) otherwise in accordance with this Act.

30(2) Subsection (1) prevails over the Freedom of Information and Protection of Privacy Act.

Records management

31(1) On the recommendation of the Commissioner, the Standing Committee on Privileges and Elections may make an order

(a) respecting the management of records in the custody or control of the Office of the Commissioner, including their creation, handling, control, organization, retention, maintenance, security, preservation, disposition, alienation and destruction and their transfer to the Provincial Archives of Manitoba;

(b) establishing or governing the establishment of programs for any matter referred to in clause (a);

(c) defining and classifying records;

(d) respecting the records or classes of records to which the order or any provision of it applies.

31(2) Despite any order made under subsection (1), if

(a) an inquiry to which a record may relate is being conducted under this Act, or

(b) the Commissioner is aware that a charge to which a record may relate has been laid under the Criminal Code (Canada) against

(i) a member or former member, or

(ii) a person who belongs to the family of a member or former member,

the record shall not be destroyed until the inquiry or the charge has been finally disposed of.

ENFORCEMENT

Commissioner's opinion on referred question

32(1) A member of the Assembly who has reasonable and probable grounds to believe that another member has contravened this Act may request that the Commissioner give an opinion as to the matter.

32(2) A member of the public who has reasonable and probable grounds to believe that a member has contravened this Act may request that the Commissioner give an opinion as to the matter.

32(3) A request under subsection (1) or (2) shall be in writing and shall set out the identity of the person making the request, the grounds for their belief, and the contravention alleged.

32(4) The Assembly may, by resolution, request that the Commissioner give an opinion as to whether a member has contravened this Act.

32(5) The Executive Council may request that the Commissioner give an opinion as to whether a member of the Executive Council has contravened this Act.

32(6) The Assembly and its committees shall not conduct an inquiry into a matter that has been referred to the Commissioner under subsection (1), (2), or (4).

Inquiry by Commissioner

33(1) After giving the member whose conduct is concerned reasonable notice, the Commissioner may conduct an inquiry

(a) on receiving a request under section 32, or

(b) where the Commissioner considers it to be in the public interest respecting the compliance of a member with the provisions of this Act.

33(2) For the purposes of an inquiry under this section, the Commissioner may elect to exercise the powers of a commissioner under Part V of the Evidence Act, in which case that Part applies to the inquiry as if it were an inquiry under that Act.

33(3) If the matter was referred under subsection 32(1), (2) or (4), or raised by the Commissioner under clause (1)(b), the Commissioner shall report his or her opinion to the Speaker.

33(4) The Speaker shall,

(a) give a copy of the opinion to the member whose conduct is concerned and to the leader of each political party that is represented in the Assembly;

(b) if the matter was referred by a member, give a copy of the opinion to that member; and

(c) cause the opinion to be laid before the Assembly forthwith if it is in session or, if not, within 10 days after the beginning of the next session.

33(4) If the matter was referred under subsection 32(2), the Commissioner shall provide a copy of his or her report to the member of the public who made the request.

33(5) If the matter was referred under subsection 32(5), the Commissioner shall report his or her opinion to the Clerk of the Executive Council.

33(6) If the Commissioner is of the opinion that

(a) the referral of a matter to him or her is frivolous, vexatious, or not made in good faith, or

(b) there are no grounds or insufficient grounds for an inquiry,

the Commissioner shall not conduct an inquiry and shall state the reasons for not doing so in the report.

33(7) If the Commissioner determines that

(a) there has been no contravention of this Act,

(b) a contravention occurred although the member took all reasonable measures to prevent it, or

(c) a contravention occurred that was trivial or committed through inadvertence or an

error of judgment made in good faith,

the Commissioner shall so state in the report and shall recommend that no penalty be imposed.

33(8) If the Commissioner determines that there was a contravention of this Act but that the member was acting in accordance with the Commissioner's recommendations and had, before receiving those recommendations, disclosed to the Commissioner all the relevant facts that were known to the member, the Commissioner shall so state in the report and shall recommend that no penalty be imposed.

Police investigation or charge

34 If the Commissioner, when conducting an inquiry, discovers that the subject-matter of the inquiry is being investigated by police or that a charge has been laid, the Commissioner shall suspend the inquiry until the police investigation or charge has been finally disposed of, and shall report the suspension to the Speaker.

Reference to appropriate authorities

35 If the Commissioner, when conducting an inquiry, determines that there are reasonable grounds to believe that there has been a contravention of any other Act or of the Criminal Code (Canada), the Commissioner shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension of the inquiry to the Speaker.

Recommendation re penalty

36(1) Where the Commissioner conducts an inquiry under subsection 33(1) and finds that the member has contravened any of sections 2 to 4, 6 to 8, 11, 12 or 14 to 16, has failed to file a private disclosure statement or a statement of material change within the time provided by section 19, or has failed to disclose relevant information in a statement, the Commissioner shall recommend in his or her report one or more of the following:

(a) that no penalty be imposed;
(b) that the member be reprimanded;
(c) that the member's right to sit and vote in the Assembly be suspended for a specified period or until a condition imposed by the Commissioner is fulfilled;
(d) that the member make restitution or pay compensation; or
(e) that the member's seat be declared vacant.

36(2) The Commissioner may also recommend the alternative of a lesser sanction or no sanction if the member carries out the recommendations in the report to rectify the breach.

Response to report

37(1) The Assembly shall consider and respond to a report from the Commissioner within 10 days after the day the report is laid before it.

37(2) The Assembly may accept or reject the findings of the Commissioner or substitute its own findings and may, if it determines that there has been a contravention of the Act,

(a) impose the sanction recommended by the Commissioner;
(b) vary the sanction recommended by the Commissioner,
(c) impose any other sanction referred to in subsection 36(1) that it considers appropriate, or
(d) impose no sanction.

37(3) The Assembly possesses all the powers and jurisdiction necessary or expedient for determining a violation of this Act and for imposing a sanction on a member under this section, and any decision by the Assembly under this section is final and conclusive and is not subject to review or appeal in any court.

37(4) If the member's seat is declared vacant, subsection 20(1) of the Legislative Assembly Act applies.

37(5) Restitution or compensation ordered to be paid under this section is a debt due to the person identified in the report as having suffered damage and may be recovered from the member to whom the report relates by that person in a court.

PROVISIONS APPLYING TO SENIOR PUBLIC SERVANTS

Definition

38 For the purposes of sections 39 to 43, "senior public servant" means

(a) the clerk of the executive council;
(b) a deputy minister or equivalent or an assistant deputy minister;
(c) a chairperson, president, vice-president, chief executive officer or deputy chief executive officer of a Crown agency;

and includes a person who, on a temporary basis, occupies a position described in clauses (a) to (c).

No contracts or benefits

39(1) Except with the approval of the Lieutenant Governor in Council, no senior public servant shall, for a period of one year following the date on which he or she leaves office, enter into a contract with, or accept a benefit from, the government or a Crown agency.

39(2) Subsection (1) does not apply to contracts or benefits that are entered into or conferred by the government or a Crown agency in the course of providing routine services to members of the public, including a senior public servant.

No acting or advising

40 Where a senior public servant acts for or advises the government or a Crown agency with

respect to a matter in which the government or Crown agency has an interest, he or she shall not, for a period of one year following the date on which he or she leaves office, act for or on behalf of a person, partnership or unincorporated association or association organization in relation to the matter.

No participation in employer's dealings

41(1) Where a senior public servant, after leaving office, accepts employment with a person, partnership or unincorporated association or organization with which he or she has official dealings during the year preceding the date on which he or she leaves office, the senior public servant, for a period of one year following the date on which he or she leaves office, shall not, directly or indirectly, attempt to influence or assist or in any way participate in

(a) deliberations of the employer with respect to a matter in which the employer has a pecuniary interest and in which the government or a Crown agency is involved;

(b) negotiations or consultations between the employer and the government or a Crown agency;

(c) the performance of obligations of the employer under a contract between the employer and the government or a Crown agency.

41(2) For purposes of subsection (1), "employment" includes:

(a) appointment to the governing board of a corporation or unincorporated association or organization; and

(b) membership in a partnership.

Offence

42 A person who contravenes section 39, 40, or 41 is guilty of an offence and liable, on conviction, to a fine of not less than $1,000 and not more than $10,000.

General exemption

43 Notwithstanding the provisions of this Act, a senior public servant may, upon leaving office,

(a) accept employment with,

(b) enter into a contract with,

(c) accept a benefit from, or

(d) accept appointment to a governing board of an agency or corporation that is established by and is accountable to,

a government of another province or a territory or the government of Canada.

MISCELLANEOUS

Review of Act

44 Within 5 years after the coming into force of this Act and every 5 years after that, a special

committee established by the Assembly must begin a comprehensive review of this Act and must submit to the Assembly, within one year after beginning the review, a report that includes any amendments recommended by the committee.

Voidability of transaction or procedure

45(1) The failure of any member to comply with subsection 8(1), section 15, or section 16, as the case may be, does not of itself invalidate

(a) any contract or other pecuniary transaction; or

(b) any procedure undertaken by the Government of Manitoba or a Crown agency with respect to a contract or other pecuniary transaction

to which the failure to comply relates, but the transaction or procedure is voidable at the instance of the Government of Manitoba or the Crown agency

(c) before the expiration of two years from the date of the decision authorizing the transaction,

(d) except as against any person, corporation, partnership, or organization who or which acted in good faith and without actual notice of the failure to comply.

45(2) Subject to subsection (1), no decision or transaction and no procedure undertaken by the Government of Manitoba or a Crown agency with respect to a decision or transaction is void or voidable by reason of a violation of this Act.

No other proceedings

46 Other than the prosecution of offences under section 17 or 42, proceedings alleging a violation of this Act shall be had and taken only under the provisions of this Act.

Transition

47 The following rules apply to members of the Assembly who are in office on the day this Act comes into force:

(a) A member need not, until the day that is 60 days after that day, comply with restrictions or fulfil obligations that did not apply before the day this Act came into force.

(b) Every member shall file a private disclosure statement under section 19 of this Act within 60 days after the day this Act comes into force.

(c) After the filing required under clause (b), the member shall file a private disclosure statement once in every calendar year on the date established by the Commissioner.

Consequential amendments

48(1) The Legislative Assembly Act is amended as follows:

(a) Sections 12 and 13 are amended by the deletion of everything following "the Legislative Assembly";

(b) Section 15 and subsection 16(1) are repealed;

(c) Subsection 16(2) is renumbered as section 16, and is amended by the deletion of everything following "a member of the Legislature";

(d) Subsection 17(1) is amended by the deletion of "or disqualifies the person from sitting or voting in the assembly,";

(e) Subsection 17(2) is amended by the deletion of "or disqualifies him from sitting or voting in the Assembly,";

(f) Clause 47(b) is repealed, and clause 47(a) is renumbered as section 47.

48(2) The Legislative Assembly and Executive Council Conflict of Interest Act is repealed.

REPORT ON THE LEGISLATIVE ASSEMBLY AND CONFLICT OF INTEREST

EXECUTIVE SUMMARY

A. INTRODUCTION

The Manitoba Law Reform Commission has conducted a comprehensive review of Manitoba's *Legislative Assembly and Executive Council Conflict of Interest Act*. Conflict of interest issues, and ethics in the public sector in general, have inspired vigorous debate and significant legislative reform in Canadian and other jurisdictions since the Act was last amended in 1989, and the Commission has drawn on the experiences of other jurisdictions to recommend significant reform to Manitoba's legislative regime.

In all, the Commission has made 50 recommendations, which it believes will, if implemented, provide Manitobans with a system of conflict of interest rules that will greatly enhance public confidence in elected provincial representatives without compromising the privacy interests of those representatives.

B. CONFLICT OF INTEREST LEGISLATION

Conflicts of interest legislation is intended to prevent elected representatives from participating in decisions or activities in which their private interests may conflict with their public duty. Although such situations are less serious breaches of the public trust than criminal offences such as bribery and fraud, they are nevertheless increasingly less and less tolerated by North American society, and legislative proscription of them has become more and more widespread over the past few decades. Every province and territory now has legislation specifically designed to prevent conflicts of interest.

Manitoba's current Act was introduced in 1983, and amended in 1988. The Act has four distinct parts. The first part requires Members of the Legislative Assembly (referred to in the Report simply as "members") to withdraw from meetings where matters arise in which they have a pecuniary interest. The second part requires members to disclose publicly, on an ongoing basis, certain information about their assets and interests. The third part, which applies as well to senior public servants, prohibits misuse of confidential information, abuse of influence, and certain kinds of contracts between former Ministers and the Province. Finally, the fourth part of the Act makes it possible for any voter to go to court to enforce the provisions of the Act.

C. OTHER CONFLICT OF INTEREST REGIMES

Since Manitoba's legislation was last amended, sweeping changes have been made to the conflict of interest legislation in virtually every other jurisdiction in Canada. Such legislation has been studied and reported on by parliamentary committees, distinguished panels, conflict of interest commissioners, and former members of the judiciary. The Commission reviewed and considered many of these reports and legislative changes, along with similar developments in the United Kingdom, Australia, and the United States.

The conflict of interest regimes in Canada's provinces and territories (other than Manitoba) share a number of common features, some of which are also common to Manitoba's Act and some of which are not. The two most significant differences between Manitoba's legislation and that of the other provinces and territories are: (a) its lack of provision for a designated individual with responsibility for administering the Act; and (b) its reliance on the courts, rather than the Legislative Assembly, for enforcement.

The federal government, along with the United Kingdom Parliament, has opted for conflict of interest guidelines rather than legislation. This is also generally true in Australia, while in the United States a variety of rules and enforcement bodies are in place.

D. REFORM OF MANITOBA'S EXISTING LEGISLATION

Given the extent of the changes the Commission has proposed to Manitoba's Act, the Commission's first recommendation for reform is to replace the Act with a new *Conflict of Interest Act*. A draft Act has been appended to the Report as Appendix A.

The single most important change the Commission has recommended is the creation of the position of "Conflict of Interest Commissioner". This individual, an independent officer of the Legislative Assembly, would be appointed by the Assembly and would report annually to the Speaker. He or she would not only be responsible for enforcing the provisions of the Act, but would also (and more importantly) assist members to comply with the Act's provisions. This would be done through various educational activities, meeting with members to review their disclosures, and providing authoritative answers to specific queries. In order to maximize the Commissioner's independence, he or she would be appointed for a six year term, which would be renewable.

The Commission has recommended that any member of the public, in addition to members of the Assembly, the Assembly itself, and Cabinet, should be able to file a complaint with the Commissioner. In addition, the Commissioner should be able to initiate an investigation of his or her own volition. If it is necessary to investigate a potential violation of the Act, the Commissioner would have the authority of a commissioner under the provisions of *The Manitoba Evidence Act* dealing with public inquiries.

On completing an investigation, the Commissioner would submit a report to the Speaker, recommending one or more of a variety of possible remedies. The final decision as to whether to discipline a member, and as to the appropriate remedy, would be left in the hands of the Assembly. Possible remedies would include a reprimand, a fine, an order of restitution or compensation, suspension of the member's privileges, and declaring the member's seat vacant. The Commissioner may recommend no penalty, or that no penalty be levied if the member takes certain steps. Whatever decision the Assembly makes would be final and not subject to appeal.

In addition to creating the position of Commissioner, the Commission has recommended a number of other major changes to the current Act. One is the definition of a conflict of interest, which is currently vague and unclear. The definition should be amended to be brought in line with the definition in use in other Canadian jurisdictions. "Apparent" conflicts of interest should also be prohibited, in order to enhance public confidence in Manitoba's political process and the province's elected representatives.

The extent to which members must account for the interests and activities of their family members should also be expanded, and the extent to which they must report the receipt of gifts or other benefits. Cabinet Ministers should be prohibited from certain activities that would be likely to conflict with their public duties. As well, Cabinet, Cabinet Ministers, and public servants would be prohibited from entering into contracts with former Ministers that would be in breach of the Act. The provisions prohibiting dealings between former Cabinet Ministers and the Province should also be clarified, simplified, and strengthened.

The Act, as noted earlier, presently covers certain senior public servants. They should not be included in the new Act, but should be the subject of separate conflict of interest guidelines instead, as inclusion in the Act is not a particularly useful way to deal with conflict of interest issues involving public servants.

The categories of information that members must disclose should be expanded and clarified. In particular, they should be required to disclose, on a private disclosure statement, the actual values of their assets and income. The Commissioner would then remove the values before the disclosure statements are made public. The public disclosure statements should be more widely available to members of the public, and in particular it should be possible for people to obtain photocopies of the statements on request.

The Commission strongly recommends that the new Act should be prefaced with a statement of principle, which would be intended to provide additional guidance to members and would increase the effectiveness of the Act's specific proscriptions. The Commission does not consider it necessary, however, to include parliamentary convention among the Conflict of Interest Commissioner's responsibilities.

Finally, the Act should be automatically reviewed every five years to ensure that it is always as effective as possible, and that it keeps step with societal expectations.

à tout électeur de faire appel aux tribunaux afin d'assurer le respect des dispositions de la Loi.

C. AUTRES RÉGIMES LÉGISLATIFS APPLICABLES EN MATIÈRE DE CONFLITS D'INTÉRÊTS

Depuis la dernière modification de la loi manitobaine, des changements majeurs ont été apportés aux lois en matière de conflits d'intérêts dans presque toutes les autres provinces et territoires du Canada. Des comités parlementaires, des groupes d'experts éminents, des commissaires chargés de veiller aux conflits d'intérêts, ainsi que d'anciens membres de la magistrature se sont penchés sur ces mesures législatives et en ont fait rapport. La Commission manitobaine a étudié et pris en considération plusieurs de ces rapports et modifications législatives. Elle a également tenu compte d'une évolution similaire dans le domaine au Royaume-Uni, en Australie et aux États-Unis.

Les régimes législatifs applicables en matière de conflits d'intérêts dans les provinces et territoires du Canada (autres que le Manitoba) ont en commun un certain nombre de caractéristiques. Certaines d'entre elles se retrouvent dans la loi manitobaine, tandis que d'autres en sont absentes. Deux différences majeures distinguent la législation manitobaine de celle des autres provinces et territoires : (a) l'absence de dispositions permettant de nommer quelqu'un chargé de veiller à l'exécution de la Loi, et (b) le recours aux tribunaux, plutôt qu'à l'Assemblée législative, pour assurer l'application de la Loi.

Le gouvernement fédéral, de même que le Parlement du Royaume-Uni, ont choisi d'adopter des lignes directrices plutôt que des lois en matière de conflits d'intérêts. Dans l'ensemble, les gouvernements de l'Australie ont choisi la même voie, tandis qu'aux États-Unis on a adopté divers règlements à ce sujet et mis sur pied des organismes chargé de veiller à leur application.

D. RÉFORME DE LA LÉGISLATION ACTUELLE DU MANITOBA

À la lumière de la réforme en profondeur proposée dans son rapport, la Commission recommande en premier de remplacer la Loi actuelle par une nouvelle loi en matière de conflits d'intérêts. Un projet de loi est annexé au rapport en tant qu'annexe A.

Le changement le plus important proposé par la Commission, c'est la création du poste de « commissaire aux conflits d'intérêts ». Cette personne, un fonctionnaire indépendant de l'Assemblée législative, serait nommée par l'Assemblée législative et ferait rapport chaque année au président de l'Assemblée. Il aurait pour tâche non seulement de veiller à l'application de la Loi, mais aussi (et de manière plus importante) d'aider les députés à s'y conformer. À cette fin, il pourrait tenir diverses séances d'information sur le sujet, rencontrer les députés afin de revoir avec eux leurs déclarations, et fournir des réponses éclairées à des questions précises. Afin d'assurer la plus grande indépendance possible du commissaire, il ou elle serait nommé pour un mandat de six

à tout électeur de faire appel aux tribunaux afin d'assurer le respect des dispositions de la Loi.

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ans, lequel ne serait renouvelable.

La Commission recommande que tout particulier, en plus des députés de l'Assemblée, de l'Assemblée elle-même et du Cabinet, puisse déposer une plainte auprès du commissaire. De plus, le commissaire devrait pouvoir instituer une enquête de son propre chef. S'il est nécessaire de faire enquête par rapport à une infraction possible de la Loi, le commissaire aurait les pouvoirs d'un commissaire tel qu'il est énoncé dans les dispositions de la *Loi sur la preuve au Manitoba* qui ont trait aux enquêtes publiques.

Une fois terminée son enquête, le commissaire soumettrait un rapport au président de l'Assemblée, accompagné de recommandations sur les mesures à prendre pour remédier à la situation. La décision de discipliner un député et le choix des sanctions appropriées reviendraient à l'Assemblée. Parmi les sanctions possibles, il y aurait la réprimande, l'amende, l'ordonnance restitutoire ou de compensation, la suspension des privilèges du député, et la déclaration que son siège est vacant. Le commissaire pourrait recommander qu'aucune peine ne soit infligée, ou qu'aucune peine ne soit infligée si le député prend certaines mesures. Quelle que soit la décision de l'Assemblée, elle serait définitive et sans appel.

En plus de la création du poste de commissaire, la Commission recommande que d'autres changements majeurs soient apportés à la Loi actuelle. Parmi ceux-ci, mentionnons la définition de conflit d'intérêts, laquelle est présentement vague et imprécise. La définition devrait être modifiée afin de la rendre conforme à celle qui a cours dans les autres provinces et territoires du Canada. L'apparence de conflit d'intérêts devrait également être interdite, afin d'augmenter la confiance des citoyens dans le processus politique du Manitoba et leurs représentants élus.

La Loi devrait préciser davantage jusqu'à quel point les députés doivent, dans leur déclaration, divulguer les droits et activités financières des membres de leur famille, de même que les dons qu'ils ont reçus et les autres avantages qui leur ont été accordés le cas échéant. Elle devrait interdire aux ministres de poursuivre certaines activités qui risqueraient d'entrer en conflit avec leurs fonctions publiques. De plus, il serait interdit au Cabinet, aux ministres et aux fonctionnaires de conclure avec d'anciens ministres des contrats qui enfreindraient la Loi. Les dispositions interdisant les transactions entre anciens ministres et la Province devraient être clarifiées, simplifiées et renforcées.

La Loi, tel qu'il a été mentionné ci-dessus, s'applique présentement à certains hauts fonctionnaires. Étant donné qu'il ne s'agit pas là d'une façon particulièrement utile de traiter des conflits d'intérêts concernant les fonctionnaires, la Commission recommande que la nouvelle loi ne s'applique pas à eux, mais qu'on élabore des lignes directrices distinctes à leur intention.

On devrait également augmenter et préciser les catégories de renseignements que les députés doivent divulguer. En particulier, ils devraient être obligés de déclarer, dans un état privé, la valeur actuelle de leurs biens et revenus. Ces valeurs n'apparaîtraient pas dans les documents que le commissaire mettrait à la disposition du public. Les citoyens et citoyennes devraient avoir

plus largement accès aux déclarations publiques de leurs élus; ils devraient entre autres pouvoir obtenir une photocopie de ces déclarations sur demande.

La Commission recommande que la Loi soit précédée d'un énoncé de principe, dont le but serait de fournir une aide supplémentaire aux députés et qui aurait pour effet de renforcer les interdictions de la Loi. Toutefois, la Commission ne croit pas qu'il est nécessaire d'inclure les conventions parlementaires parmi les responsabilités du commissaire aux conflits d'intérêts.

Enfin, on devrait automatiquement revoir la Loi aux cinq ans, afin de s'assurer qu'elle demeure toujours efficace et afin de la modifier en fonction de l'évolution de la société.